













The  
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# THE LAW OBSERVER.

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[No.

## Resolutions of the High Court, dated 3rd April, 1872, and the Memorial of the Vakeels of the High Court.

We reproduce elsewhere the memorial of the Vakeels of the High Court, protesting against the Resolutions passed by the Court on the 3rd of April last, anent the admission and enrolment of Attorneys of the High Court as Vakeels thereof and *vice versa*, i.e., in respect of the admission and enrolment of Vakeels of the High Court as Attorneys at Law. The Resolutions referred to are:—

*First.*—That any person who is an Attorney of the High Court may be admitted as a Vakeel upon satisfying the Court that he is a fit and proper person to be so admitted.

*Secondly.*—That any Vakeel of the High Court may be admitted and enrolled as an Attorney, after having duly served under articles of clerkship, and been examined and duly certified to be fit and capable to act as an Attorney, and after having complied with the rules from time to time in force for admission and enrolment of Attorneys of High Court, provided that no Vakeel shall, during his service under articles of clerkship, practise as a vakeel.

The memorial, we fear, is unnecessarily lengthy and many a sentence reflecting on the general and professional

attainments of the Attorneys might have been omitted.

We understand that the memoriali have received an answer intimating that none but such Attorneys as are duly qualified to be admitted as Vakeels will be enrolled as such.

The Court has certainly the power to admit and enroll at its discretion any body to be a Vakeel, who may be considered to be duly qualified to be admitted as such. Now it appears that by a Resolution of the Court passed in 1865, none but Bachelors of Law of the University of Calcutta, are eligible as Vakeels of the High Court at Fort William in Bengal. This Resolution is yet in force; and we wonder how the Court in passing the first of the two Resolutions we have referred to, wholly overlooked the wholesome provision embodied in the Resolution of 1865. The Court certainly had the power to repeal that Resolution, but so long as it was not actually rescinded, we fear, the Court had no power to introduce a Resolution which virtually and substantially nullified the effect of the previous Resolution. There is a proviso, however, in the first of the two Resolutions under notice, to the effect that an Attorney, before he is admitted a Vakeel, must, in the first instance, satisfy the Court, "that he is a fit and proper person to be so admitted." If the Court should interpret the above proviso by the light of the

of 1865, that no body was a proper person to be admitted who was not a Bachelor of the University of Calcutta, there is an end of the matter and, if we understand Mr. Peacock's letter to the memorial, it appears the Court has had its attention drawn to the Resolution of 1865.

We are quite sure that if the Court intended that every Attorney as was entitled to be admitted a Vakeel of the High Court, there would have been no necessity for the qualifying or restrictive clause to which we have referred. We cannot for a moment persuade ourselves to believe that by "a fit and proper person" the Court meant every Attorney-at-law against whose character nothing disparaging was known.

As matters at present stand, there are no rules by which the young men who may wish to enter into articles of clerkship are required to prove their general attainments by undergoing any prescribed test or by producing any certificates of qualification from the University or any other duly constituted body of examiners. The Court is fully aware of this, and we cannot be so uncharitable as to suppose that the Judges were indirectly endeavouring to undermine high legal education and consequently high general education in Bengal. If they intended to give every Attorney the privilege of a Vakeel of the High Court, though every Vakeel of the High Court as such was not entitled to those of an Attorney, could it be for a moment supposed that any body would think it worth his while to take his degree in Law in the University? The consequence will be that the Law Classes will be deserted and the Law Professorships will have to be abolished. Nay more, this will tell also on the General Department of our Colleges. Young men here take their degrees in Arts simply because that is the only stepping stone to a degree in Law. But if the value of a degree in Law is set by the Judges of the High Court at such a low figure, no body would think it worth his while to

take his degree in Arts. As soon as a young man acquired a smattering of English, he would, if he had a liking for the profession of the Law, at once enter into articles of clerkship with an Attorney, inasmuch as at the end of five years from that period, if he succeeded in passing the prescribed examination, he would be entitled to be an Attorney-at-law as well as a Vakeel of the High Court.

By the rules of the Medical College the possession of an "Entrance" certificate entitles a young man of the age of 16 or more to be admitted as a student on its rolls. Accordingly young men of mediocre parts, or being below the average standard, flock to that College as soon as they pass their "matriculation." The same remarks hold good in respect of students of the Civil Engineering class. General education is valued so far only as it is necessary for the purposes of a technical education.

Young men of brilliant parts, and high position in society generally aspire to the profession of the Law. These constitute the strength of the higher forms of our Colleges inasmuch as the possession of a Bachelor's degree is a condition precedent to one's being allowed to go up for the degree of Bachelor of Law. Now, if the degree of Bachelor of Law does not secure a higher status and emoluments in life than what an Attorney commands, no body will hanker after it, and consequently no body will think it necessary or even worth his while to graduate in Arts.

Thus the first Resolution, if not construed in the way we have indicated, will prove a death blow to the cause of high education in Bengal.

With reference to the second Resolution we have not much to say. Articles of clerkship must be served for a stated period, before a person can be admitted an Attorney-at-law. Even Mr. Slack, a Barrister-at-law had to serve out his articles before he was enrolled as an Attorney of the late Supreme Court. What appears to us to be objectionable in the Resolution is, that no distinction is made between a Vakeel of the Hig'

Court and a raw youth of sixteen with little or no general attainments as to the period during which they are each required to serve their noviciate. Each must serve out his articles for the same period. This is even-handed justice with a vengeance. Sauce for the goose is the sauce for the gander. Then, again, the Vakeel of the High Court must pass the required examination, no matter what other law examinations he passed on previous occasions. By this Resolution the Hon'ble Judges seem wholly to ignore the legal attainments of the Vakeels. Well may the Memorialists say that the Resolutions are calculated to prove highly injurious to them as a class and "to considerably lower their position and status."

We cannot conclude this article without expressing a hope that the Judges of the High Court will be pleased to reconsider the Resolutions under notice and so alter or modify them as to them may appear fit, consistently with the rights and privileges of the two classes of legal practitioners whom they concern.

*Memorial of the Vakeels to the High Court, dated 10th April, 1872.*

We are glad to see that the Vakeels of the High Court have at last roused themselves from their lethargy and manifested what we consider to be unmistakeable signs of returning animation. On the 10th of April last they presented a Memorial to Sir Richard Couch, Kt., Chief Justice, and his companion Justices, which we publish in another page, praying that the Rules of 6th July 1862, as well as those which were declared to have effect from the coming into operation of the new Charter of the Court dated 28th December 1865, might be reconsidered along with certain other rules passed on the 19th of January 1871, for the admission and enrolment of Mooktears, inasmuch as the said rules militated against certain rights and privileges to which they

(the Vakeels) believed themselves to be entitled under the provisions of the Letters Patent by which the High Court of Bengal was constituted. The substance of the prayer was that the Memorialists might be allowed as Vakeels to appear, act and plead in the original side of the High Court, and that the rules by which certain Mooktears were enrolled as officers of the Court might be cancelled.

If the Vakeels intended to stand upon their rights, such as were "guaranteed"—to use their own language—to them under the provisions of the Letters Patent above alluded to, they ought to have put forward their claim to appear, act and plead in both sides of the Court immediately upon the establishment of the High Court in 1862. They suffered, however, the most fitting opportunity to be heard in support of their rights to pass away, and never thought of the matter until nearly full ten years had elapsed since the amalgamation of the late Sudder and Supreme Courts. All who felt any interest in them as a body of legal practitioners, trained in the laws and the languages of the country, wondered at their apathy and could hardly make out what their silence meant. Indeed their conduct appeared to be a riddle—wholly inexplicable. Whether they meant to bide their time and wait till the completion of the High Court building, when both sides of the Court were expected to sit under the same roof, we do not know; but if such was their meaning, we say it was simply a mistake.

On the principle, however, of better late than never, the present Memorial appears to us to be an attempt to rectify a huge blunder, and, regarded from this point of view, we do not think it is ever too late to correct a mistake.

Upon receipt of the Memorial the Registrar of the High Court—if we are rightly informed—sent one copy of the same to the Advocate General on behalf of the Advocates, and another to the Secretary to the Attorneys' Association and a third copy to some body that rejoiced in the euphonious designation of Honorary Secretary to the Mook-



tears' Association, and at the same time addressed a letter to Babu Unnoda Pershad Bannerjia, Senior Government Vakeel, intimating to him that the Court had determined to hear the Vakeels in support of their Memorial, upon a day which was to be fixed hereafter; and of which, of course, due notice would be given. The 16th of May was, however, appointed for the purpose; when lo! Babu Annoda Pershad Bannerjia appeared in support of the Memorial and the Advocates, the Attorneys and even the Mooktears mustered, sufficiently strong, as directed by the Court, to oppose it. The Bench on the occasion was composed of all the Judges of the Court, being nine in number, and the Court, as was expected, was crowded to suffocation. The Court house presented an extraordinary scene on the occasion. Advocates, Vakeels, Attorneys *et hoc genus omne* elbowed and jostled one another in their struggle to reach the front ranks. The case indeed was not a common one. It was a case, as the Court believed, of Vakeels *versus* all other classes of legal practitioners. Hence the Court directed that the Advocates, the Attorneys, and even the Mooktears should be duly represented at the hearing. Indeed after Baboo Unnoda Pershad, who appeared in support of the Memorial, had finished, the Court called upon the representatives of the other classes of legal practitioners to urge what they had to say against what the learned Judges believed to be the most extravagant claim of the Vakeels.

Really we fail to perceive the necessity which the Court felt of summoning the Advocates, the Attorneys, and the Mooktears to appear and argue the points raised in the memorial. The Memorialists based their prayer upon certain abstract points of law which the Court was fully competent to decide without any assistance from the other classes of legal practitioners. There was not a word in the Memorial against the Advocates and the Attorneys. As for the Mooktears, they being only the accredited agents of their principals, the Memorialists only humbly pointed out that their enrolment

as officers of the Court was contrary to the provisions of the letters patent. At the time the rules of 19th January 1871 were passed, the Advocates, the Vakeels and the Attorneys were not called upon to shew cause why a fourth class of legal practitioners should not be introduced into the High Court. The Court of its own motion passed the rules, and if those rules now appeared to be contrary to law, the Court could cancel them at once. At all events, it appears to us, that the proceedings which were held with reference to the memorial under notice were wholly uncalled for. If the prayer of the Memorialists appeared to the Court to be reasonable, there was nothing to prevent the Court from granting it at once, and if, on the contrary, the Court considered the prayer to be unreasonable, the Court could reject it without the "pomp and circumstance" which it was thought necessary to evoke for the nonce.

We understand that the Court has decided against the Memorialists; judgment, however, has not yet been delivered. We accordingly reserve further comments till another opportunity.

### *In re Regular Appeal No. 281 of 1871.*

Sreemoty Sreemoty Dossee, and Sreemoty Bhoggo Mony Dossee	} <i>Defendants, Appellants.</i>
<i>versus</i>	
Sreemoty Soudaminy Dossee .. ..	} <i>Plaintiff, Respondent.</i>

In another page will be found a decision of the High Court of Calcutta which involves a point of no ordinary importance. The learned Judges held in the above Regular Appeal, that under Section 22 of Act VI of 1871 no Regular Appeal lay to the High Court, inasmuch as the subject matter in dispute did not exceed Rupees five thousand. It appears that the appeal, which came on for hearing before their Lordships,

was laid at Rupees 2,500 only, although the original suit, as laid by the plaintiff, was valued at Rupees 12,343-0-16 gundas, but which the Second Subordinate Judge of the Twenty-four-Pergunahs, with reference to an objection put forward by the defendants, reduced to Rupees 6,917. Now, the Court of first instance decreed the lands in dispute which were valued at Rupees 2,500 to plaintiff without the mesne profits as claimed in the plaint. The defendants accordingly appealed to the High Court, laying their appeal at the valuation of the lands as fixed by the Subordinate Judge, to wit, Rupees 2,500, and not at the valuation which had been set upon them by the plaintiff, that is, Rupees 7,926. The High Court held that under Section 22, Act VI of 1871, no appeal from the decree passed by the Subordinate Judge lay to the High Court, inasmuch as the value of the property decreed did not exceed Rupees five thousand.

This Ruling of the High Court, based upon Section 22, Act VI of 1871, is the first of its kind, the point having never before been raised and decided. Now let us see whether the construction put by their Lordships upon the Section of the Act above referred to is in conformity with the letter as well as the spirit of the law, which is administered in the Bengal Division of the Presidency of Fort William.

Section 22, Act VI of 1871, runs thus :—

“Appeals from decrees and orders of Subordinate Judges and Moonsiffs shall, when such appeals are allowed by law, lie to the District Judge, except when the amount or value of the subject matter in dispute exceeds five thousand Rupees, in which case the appeal shall lie to the Court.”

Section 18, Act XVI of 1868, which has been repealed by Act VI of 1871, stood thus :—

“In suits decided by any Subordinate Judge in the exercise of his original jurisdiction of which the amount or value does not exceed Rupees 5,000, an appeal shall lie to the District Judge, to

whose control such Subordinate Judge is subject.

“In all other suits decided by any Subordinate Judge, whether in the exercise of his original or appellate jurisdiction, the appeal from the decision of such Judge shall lie direct to the High Court.”

Section 16 of Act XIV of 1869, which applies to the Courts of the Bombay Presidency, is to the following effect :—

“The District Judge may refer to any Assistant Judge subordinate to him original suits of which the subject matter does not exceed ten thousand Rupees in amount or value, and miscellaneous applications not being of the nature of the appeals. The Assistant Judge shall have jurisdiction to try such suits and to dispose of such applications. Where the Assistant Judge's decrees and orders in such cases are appealable, the appeal shall lie to the District Judge or to the High Court, according as the *amount or value* of the *subject matter* does not exceed or exceeds 5,000 Rupees.”

The law of 1837, that is, Section 4, Act XXV. of 1837, which was repealed by Act XVI. of 1868, was very clear on the subject, and left nothing to be inferred by the Judicial authorities. It ran thus :—  
“And it is hereby enacted that in all suits exceeding the amount or value specified in Clause first, Section 18, Regulation V of 1831, which shall, under the authority of Section 1 of this Act, be referred to a Principal Sudder Ameen, the appeal from the decision of such Principal Sudder Ameen be directed to the Court of Sudder Dewany Adawlut, and shall be conducted in all respects according to the same rules as if it were an appeal from the decision of a Zillah Judge to the said Court of Sudder Dewany Adawlut.”

According to this Section of Act XXV. of 1837, the amount at which a *suit* was laid determined the venue of appeal. If the suit was originally laid at more than Rupees 5,000, and such suit was decided by a Principal Sudder Ameen, an appeal lay direct to the Sudder De-

wany Adawlut (High Court) quite irrespective of the amount to which the decree of the Principal Sudder Ameen related.

It does not appear that in passing Act XVI of 1868 the Legislature intended to introduce a change in our judiciary system. Section 18 of that Act provided that in *suits* decided originally by Subordinate Judges, of which the amount or value did not exceed Rupees 5,000, the first appeal lay to the District Judge, and in all other *suits* decided by those officers, whether originally or in appeal, the appeal lay direct to the High Court. Under this law, therefore, all appeals in suits of which the amount or value exceeded Rupees five thousand, if decided in the first instance by Subordinate Judges, lay to the High Court, without any reference to the amount or value that formed the subject of their decrees.

Now, Section 22 Act VI of 1871 corresponds with Section 18 of Act XVI of 1868. By comparing the language of the two Sections, it appears that in lieu of the words "In all other *suits*," &c., "the appeal from the decision of such Judge shall lie direct to the High Court," which occur in Section 18, Act XVI of 1868, we have in Section 22, Act VI of 1871, "except where the amount or value of the *subject matter in dispute* exceeds five thousand Rupees, in which case the appeal shall lie to the High Court." Certainly, the words which occur in the Act of 1868 are clear beyond doubt, and not at all susceptible of a double meaning. The same, however, cannot be predicated of the language used in Section 22, Act VI of 1871. If the Legislature had used the word *suit* instead of the "*subject matter in dispute*" all ambiguity would have been prevented.

But where the language is ambiguous, the correct meaning is found out by a reference to tests, which are infallible in all such cases. Now, the words "*subject matter in dispute*" may mean either the subject matter in dispute in the suit or the subject matter in dispute in the appeal. In order, therefore, to deter-

mine which is the correct interpretation, we must see which appears to be reasonable and is warranted under the law and practice now in force.

The construction which the Hon'ble Judges who decided the Regular Appeal under notice have put upon the words of the Section on which their ruling is based, is, that the words "*subject matter in dispute*" have reference to the subject matter in dispute *in the appeal*, and cannot possibly have any connection with what formed the subject matter of dispute in the *original suit*. Now, let us see whether this construction could stand the tests which we propose to apply to it.

In the first place, there is nothing in the statement of the objects and reasons of Act VI of 1871 to justify the supposition that the Legislature introduced the words "*subject matter in dispute*" *advisedly*, and intended by this new phraseology to adopt a principle for determining the tribunal to which an appeal would lie, different from what was recognized under Acts XXV of 1837 and XVI of 1868. Under these last enactments, venue of appeal was determined with reference to the amount or value at which the original suit was laid and not with reference to the value or amount which appeared in the decree of the Principal Sudder Ameen or Subordinate Judge who decided the suit in the first instance. There is nothing to shew that the Legislature in passing Act VI of 1871 intended to depart from this old and well-recognized principle, and therefore adopted a formulary of words different from what was used in the former Acts. This intention cannot, however, be gathered only from the words used, which are susceptible of double meaning. If such had been their intention, a corresponding modification would have been effected in those Acts by which the procedure of our Courts is now regulated.

In the second place, Section 22, Act VI of 1871, appears in Chapter III of the Act which refers to "Ordinary Jurisdiction" and not to *Appeals*. The words "*subject matter in dispute*" would there-

fore seem to refer to what formed the subject matter in dispute in the *suit* as laid, and not to what was decreed by the Court of first instance.

In the third place, let us apply another test. Now, by Section 348, Act VIII of 1859 "upon the hearing of the appeal, the respondent may take any objection to the decision of the Lower Court which might have been taken if he had preferred a separate appeal from such decision." In the case under notice, the appeal was laid at Rupees 2,500, although the suit as laid originally was valued at Rupees 12,343-0-16 gundas. If, as held by the High Court, the first appeal in this case lay to the District Judge, the respondent could, upon the hearing of such appeal, take any objection to the decision of the Lower Court. She could impeach the finding of the first Court upon the question of valuation of the suit, and upon her objection the District Judge was at liberty to set aside the decision arrived at upon that point by the Original Court, and, restoring the valuations as originally made by her, might give her a decree for the full amount claimed in the plaint. Now, if the defendants, thus cast, chose to try their luck in the High Court, they could come up there only in special appeal; and, as special appellants, they could not impugn the findings of the District Judge on questions of fact, and if the decision of the District Judge involved no points of law, they would be substantially and virtually debarred from appealing to the highest tribunal of appellate jurisdiction in the country, although the amount or value of the property decreed against them came up to more than rupees 12,000. But this is not all. If they wished to carry their case to England, it would come before their Lordships, Privy Council, not after having been decided in Regular Appeal by the High Court on all questions of law and fact; but, after having come before the High Court as a matter of form in special appeal, to be only dismissed with costs. Really if this actually came to pass, we wonder

what their Lordships of Her Majesty's Privy Council would think of the administration of justice in this country.

In construing Acts of the Legislature, we should not confine ourselves only to the letter of the law, but it ought to be our duty to give it a *reasonable* construction; in perfect keeping with the general spirit and tenor of the law as administered by our Courts.

In Section 16, Act XIV of 1869, which we have quoted above, occur only the words; "Amount or value of the subject matter," without the words "in dispute," which are found in Section 22, Act VI of 1871. Evidently the addition of the words "in dispute" makes no difference, in the interpretation which is to be put upon the words "amount or value of the subject matter." Our learned Chief Justice is certainly ~~the~~ best aware how these words have been construed by the highest tribunal in that part of the country.

As we have remarked above, the language of Section 22, Act VI of 1871 is certainly susceptible of two meanings. Grammatically the words "amount or value of the subject matter in dispute" may relate as well to the amount or value of the subject matter in the appeal as to the subject matter in the suit. We cannot, therefore, say that the learned Judges, who have construed them as referring to the amount or value of the subject matter *in the appeal*, are grammatically wrong in their interpretation. We have attempted simply to point out to their Lordships what can possibly be urged in support of the opposite contention; and if, with reference to what we have ventured to say on the subject, their Lordships should be inclined to re-open the question, and after hearing arguments of counsel on both sides, should still adhere to the opinion which they have already expressed, we think that not only we will have done our duty as public journalists, but their Lordships also will have done what we consider to be their duty to the public at large.

### *Criminal Sessions—High Court— Undefended Native Prisoners.*

THOSE who have had any opportunities of being present at the Criminal Sessions of the High Court of Calcutta, must have observed the off-hand mode in which the trial of undefended Native prisoners is ordinarily conducted. It is time therefore, we think, that the attention of the authorities should be drawn to the subject, with a view to the early adoption of such measures as may be necessary, for the removal of what appears to us, to be a stigma upon the administration of criminal justice in the metropolis of British India.

Now, let us follow a trial through all its stages in the Sessions Court. First of all, the prisoner, often in rags, is introduced into the dock. There he stands trembling, with hands folded,—and impressed awfully with the solemnity of the scene around him, which, or perhaps the like of which he never witnessed before. The Standing Counsel then opens the case against him. Of course, the address is in English, of which the unfortunate prisoner is wholly innocent. He understands therefore not a word of what is urged against him, nor is any attempt made to explain it to him.

Witnesses are next called in support of the prosecution. They are examined one by one by the Standing Counsel. He asks them questions in English, which are translated to them in an *undertone*, by an Interpreter in their own mother tongue. The answers are returned in a *low* voice, which the Interpreter alone understands, and which he *loudly* translates into English for the benefit of the Court and the Standing Counsel. This, of course, the prisoner does not understand, and yet, as a matter of form, he is asked whether he has any questions to put by way of cross examination. But how can he do this when he has not understood a word of the questions which were put to the witnesses in the

examination in chief, and the answers which such examination elicited? Accordingly no cross examination takes place. The charge, therefore, it is easy to establish, unless the witnesses for the prosecution should happen to break down for some reason or other which it is not very difficult to account for.

After the case for the prosecution is closed, the prisoner is asked whether he has any thing to say in his defence. This is really absurd. It is impossible to believe that, one who has not understood at all what the Standing Counsel said in his opening address, nor what the witnesses stated against him on oath, should muster hardihood enough to occupy the time of the Court by attempting, under such circumstances, by an elaborate speech to undo the effect of what in the opinion of the Judge and the Jury has been clearly established against him. He accordingly contents himself with protesting his innocence, which no body thinks it proper to believe.

This sort of proceeding is, we fear, any thing but consistent with the letter and spirit of the law which is administered by our Courts; and yet this mockery of Justice may be seen at every criminal sitting of the High Court. The result is, that, in nine cases out of ten, poor innocent people are found guilty, who, if they had means sufficient to retain Counsel on their behalf, might, with such legal assistance, make themselves sure of an honorable acquittal. We cannot say that, under the circumstances as we have set forth, the Judge is open to a charge of misdirection; or the Jury either to a charge of improperly bringing in a verdict of "guilty" when they should have acquitted the prisoner. The Jury are bound to decide upon the evidence before them, and they decide accordingly. No blame can attach to them.

The question then is, how can this state of things, to which we have adverted above, be obviated or removed.

We will discuss the subject in our next issue.

# ACTS

## COUNCIL OF THE GOVERNOR-GENERAL OF INDIA.

ACT No. I of 1872.

### The Indian Evidence Act, 1872.

#### PART I.

#### RELEVANCY OF FACTS.

##### CHAPTER I.—PRELIMINARY.

1. This Act may be called "The Indian Evidence Act, 1872:"

Short title.

It extends to the whole of British India, and applies to all judicial proceedings in or before any Court, including Courts Martial, but not to affidavits presented to any Court or Officer, nor to proceedings before an arbitrator;

and it shall come into force on the first day of September 1872:

Commencement of Act.

2. On and from that day the following Repeal of enact- laws shall be repealed :—  
ments.

(1) All rules of evidence not contained in any Statute, Act or Regulation in force in any part of British India:

(2) All such rules, laws and regulations as have acquired the force of law under the twenty-fifth section of 'The Indian Council's Act, 1861,' in so far as they relate to any matter herein provided for; and

(3) The enactments mentioned in the schedule hereto, to the extent specified in the third column of the said schedule.

But nothing herein contained shall be deemed to affect any provision of any Statute, Act or Regulation in force in any part of British India and not hereby expressly repealed.

3. In this Act the following words and expressions are used in the following senses, unless a contrary intention appears from the context :—

Interpretation- clause.

"Court" includes all Judges and Magistrates, and all persons, except arbitrators, legally authorised to take evidence.

"Fact." "Fact" means and includes—

(1) any thing, state of things, or relation of things, capable of being perceived by the senses;

(2) any mental condition of which any person is conscious.

##### Illustrations.

(a) That there are certain objects arranged in a certain order in a certain place, is a fact.

(b) That a man heard or saw something is a fact.

(c) That a man said certain words is a fact.

(d) That a man holds a certain opinion, has a certain intention, acts in good faith, or fraudulently, or uses a particular word in a particular sense, or is or was at a specified time conscious of a particular sensation, is a fact.

(e) That a man has a certain reputation is a fact.

One fact is said to be relevant to another

"Relevant." when the one is connected with the other in any of the ways referred to in the provisions of this Act relating to the relevancy of facts.

The expression "Facts in issue" means and includes—

any fact from which, either by itself or in connection with other facts, the existence, non-existence, nature, or extent of any right, liability, or disability, asserted or denied in any suit or proceeding, necessarily follows.

Explanation.—Whenever, under the provisions of the law for the time being in force relating to Civil Procedure, any Court records an issue of fact, the fact to be asserted or denied in the answer to such issue, is a fact in issue.

##### Illustrations.

A is accused of the murder of B.

At his trial the following facts may be in issue :—

That A caused B's death;

That A intended to cause B's death;

That A had received grave and sudden provocation from B;

That A, at the time of doing the act which caused B's death, was, by reason of unsoundness of mind incapable of knowing its nature.

"Document" means any matter expressed or described upon any substance by means of letters, figures, or marks, or by more than one of those means, intended to be used, or which may be used, for the purpose of recording that matter.

#### Illustrations.

A writing is a document.

Words printed, lithographed or photographed are documents.

A map or plan is a document.

An inscription on a metal plate or stone is a document. A caricature is a document.

"Evidence."

"Evidence" means and includes—

(1) all statements which the Courts permits or requires to be made before it by witnesses in relation to matters of fact under inquiry;

such statements are called oral evidence :

(2) all documents produced for the inspection of the Court ;

such documents are called documentary evidence.

A fact is said to be proved when, after considering the matters before it, the Court either

"Proved."

believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists.

A fact is said to be disproved when, after considering the matters before it, the Court either

"Disproved."

believes that it does not exist, or considers its non-existence so probable that a prudent man ought, under the circumstances of the particular case to act upon the supposition that it does not exist.

A fact is said not to be proved when

"Not proved."

it is neither proved nor disproved.

4. Whenever it is provided by this Act

"May presume."

that the Court may presume a fact, it may either regard such fact as proved, unless and until it is disproved, or may call for proof of it.

"Whenever it is directed by this Act that

"Shall presume."

the Court shall presume a fact, it shall regard such fact as proved, unless and until it is disproved.

When one fact is declared by this Act to

"Conclusive proof"

be conclusive proof of another, the Court shall on proof of the one fact regard the other as

proved, and shall not allow evidence to be given for the purpose of disproving it.

## CHAPTER II.—OF THE RELEVANCY OF FACTS.

5. Evidence may be given in any suit or proceeding of the existence or non-existence of every fact in issue and of such other facts as are hereinafter declared to be relevant, and of no others.

*Explanation.*—This section shall not enable any person to give evidence of a fact which he is disentitled to prove by any provision of the law for the time being in force relating to Civil Procedure.

#### Illustrations.

(a) A is tried for the murder of B by beating him with a club with the intention of causing his death.

At A's trial the following facts are in issue—

A's beating B with the club ;

A's causing B's death by such beating ;

A's intention to cause B's death.

(b) A suitor does not bring with him, and have in readiness for production at the first hearing of the case, a bond on which he relies. This section does not enable him to produce the bond or prove its contents at a subsequent stage of the proceedings, otherwise than in accordance with the conditions prescribed by the Code of Civil Procedure.

6. Facts which, though not in issue, are so connected with a fact in

Relevancy of facts forming part of same transaction.

issue as to form part of the same transaction, are relevant, whether they occurred at the same time and place or at different times and places.

#### Illustrations.

(a) A is accused of the murder of B by beating him. Whatever was said or done by A or B or the by-standers at the beating, or so shortly before or after it as to form part of the transaction, is a relevant fact.

(b) A is accused of waging war against the Queen by taking part in an armed insurrection in which property is destroyed, troops are attacked, and jails are broken open. The occurrence of these facts is relevant, as forming part of the general transaction, though A may not have been present at all of them.

(c) A sues B for a libel contained in a letter forming part of a correspondence. Letters between the parties relating to the subject out of which the libel arose, and forming part of the correspondence in which it is contained, are relevant facts, though they do not contain the libel itself.

(d) The question is whether certain goods ordered from B were delivered to A. The goods were delivered to several intermediate persons successively. Each delivery is a relevant fact.



## 7. Facts which are the occasion, cause, or effect, immediate or otherwise, of relevant facts, or

Facts which are occasion, cause, or effect of facts in issue, or which constitute the state of things

under which they happened, or which afforded an opportunity for their occurrence or transaction, are relevant.

### Illustrations.

(a) The question is, whether A robbed B.

The facts that, shortly before the robbery, B went to a fair with money in his possession, and that he showed it, or mentioned the fact that he had it, to third persons, are relevant.

(b) The question is, whether A murdered B.

Marks on the ground, produced by a struggle at or near the place where the murder was committed, are relevant facts.

(c) The question is, whether A poisoned B.

The state of B's health before the symptoms ascribed to poison, and habits of B, known to A, which afforded an opportunity for the administration of poison, are relevant facts.

## 8. Any fact is relevant which shows or constitutes a motive or preparation for any fact in issue or relevant fact.

Motive, preparation and previous or subsequent conduct.

The conduct of any party, or of any agent to any party, to any suit or proceeding in reference to such suit or proceeding, or in reference to any fact in issue therein or relevant thereto, and the conduct of any person an offence against whom is the subject of any proceeding, is relevant, if such conduct influences or is influenced by any fact in issue or relevant fact, and whether it was previous or subsequent thereto.

*Explanation 1.*—The word "conduct" in this section does not include statements, unless those statements accompany and explain acts other than statements: but this explanation is not to affect the relevancy of statements under any other section of this Act.

*Explanation 2.*—When the conduct of any person is relevant, any statement made to him or in his presence and hearing, which affects such conduct, is relevant.

### Illustrations.

(a) A is tried for the murder of B.

The facts that A murdered C, that B knew that A had murdered C, and that B had tried to extort money from A by threatening to make his knowledge public, are relevant.

(b) A sues B upon a bond for the payment of money. B denies the making of the bond.

The fact that, at the time when the bond was alleged to be made, B required money for a particular purpose, is relevant.

(c) A is tried for the murder of B by poison.

The fact that, before the death of B, A procured poison similar to that which was administered to B, is relevant.

(d) The question is whether a certain document is the will of A.

The facts that, not long before the date of the alleged will, A made inquiry into matters to which the provisions of the alleged will relate, that he consulted vakils in reference to making the will, and that he caused drafts of other wills to be prepared, of which he did not approve, are relevant.

(e) A is accused of a crime.

The facts that, either before, or at the time of, or after the alleged crime, A provided evidence which would tend to give to the facts of the case an appearance favourable to himself, or that he destroyed or concealed evidence, or prevented the presence or procured the absence of persons who might have been witnesses or suborned persons to give false evidence respecting it, are relevant.

(f) The question is, whether A robbed B.

The facts that, after B was robbed, C said in A's presence—'the police are coming to look for the man who robbed B,'—and that immediately afterwards A ran away, are relevant.

(g) The question is, whether A owes B rupees 10,000.

The facts that A asked C to lend him money, and that D said to C in A's presence and hearing—'I advise you not to trust A, for he owes B 10,000 Rs.'—and A went away without making any answer, are relevant facts.

(h) The question is, whether A committed a crime.

The fact that A absconded after receiving a letter warning him that inquiry was being made for the criminal, and the contents of the letter, are relevant.

(i) A is accused of a crime.

The facts that, after the commission of the alleged crime, he absconded, or was in possession of property or the proceeds of property acquired by the crime, or attempted to conceal things which were or might have been used in committing it, are relevant.

(j) The question is, whether A was ravished.

The facts that, shortly after the alleged rape, she made a complaint relating to the crime, the circumstances under which and the terms in which the complaint was made, are relevant.

The fact that, without making a complaint, she said that she had been ravished is not relevant as conduct under this section, though it may be relevant

as a dying declaration under section thirty-two, (one), or

as corroborative evidence under section one hundred and fifty-seven.

(k) The question is, whether A was robbed.

The fact that, soon after the alleged robbery, he made a complaint relating to the offence, the circumstances under which, and the terms in which, the complaint was made, are relevant.

The fact that he said he had been robbed without making any complaint is not relevant as conduct under this section, though it may be relevant

as a dying declaration under section thirty-two, clause (one), or

as corroborative evidence under section one hundred and fifty-seven.



## 9. Facts necessary to explain or introduce

Facts necessary to explain or introduce relevant facts.

a fact in issue or relevant fact, or which support or rebut an inference suggested by a fact in issue or relevant fact, or which establish the identity of any thing or person whose identity is relevant, or fix the time or place at which any fact in issue or relevant fact happened, or which show the relation of parties by whom any such fact was transacted, are relevant in so far as they are necessary for that purpose.

*Illustrations.*

(a) The question is whether a given document is the will of A.

The state of A's property and of his family at the date of the alleged will may be relevant facts.

(b) A sues B for a libel imputing disgraceful conduct to A. B affirms that the matter alleged to be libellous is true.

The position and relations of the parties at the time when the libel was published may be relevant facts as introductory to the facts in issue.

The particulars of a dispute between A and B about a matter unconnected with the alleged libel are irrelevant, though the fact that there was a dispute may be relevant if it affected the relations between A and B.

(c) A is accused of a crime.

The fact that, soon after the commission of the crime, A absconded from his house, is relevant, under section eight, as conduct subsequent to and affected by facts in issue.

The fact that, at the time when he left home, he had sudden and urgent business at the place to which he went, is relevant as tending to explain the fact that he left home suddenly.

The details of the business on which he left are not relevant, except in so far as they are necessary to show that the business was sudden and urgent.

(d) A sues B for inducing C to break a contract of service made by him with A. C on leaving A's service, says to A—'I am leaving you because B has made me a better offer.' This statement is a relevant fact as explanatory of C's conduct, which is relevant as a fact in issue.

(e) A, accused of theft, is seen to give the stolen property to B, who is seen to give it to A's wife. B says, as he delivers it—'A says you are to hide this.' B's statement is relevant as explanatory of a fact which is part of the transaction.

(f) A is tried for a riot and is proved to have marched at the head of a mob. The cries of the mob are relevant as explanatory of the nature of the transaction.

## 10. Where there is reasonable ground to

Things said or done by conspirator in reference to common design.

believe that two or more persons have conspired together to commit an offence or an actionable wrong, any thing said, done, or written by any one of such persons in reference to their common intention, after the time when such intention was

first entertained by any one of them, is a relevant fact as against each of the persons believed to be so conspiring, as well for the purpose of proving the existence of the conspiracy as for the purpose of showing that any such person was a party to it.

*Illustration.*

(a) Reasonable ground exists for believing that A has joined in a conspiracy to wage war against the Queen.

The facts that B procured arms in Europe for the purpose of the conspiracy, C collected money in Calcutta for a like object, D persuaded persons to join the conspiracy in Bombay, E published writings advocating the object in view at Agra, and F transmitted from Delhi to G at Cabul the money which C had collected at Calcutta, and the contents of a letter written by H giving an account of the conspiracy, are each relevant, both to prove the existence of the conspiracy, and to prove A's complicity in it, although he may have been ignorant of all of them, and although the persons by whom they were done were strangers to him, and although they may have taken place before he joined the conspiracy or after he left it.

When facts not otherwise relevant become relevant.

## 11. Facts not otherwise

relevant are relevant—

(1) if they are inconsistent with any fact in issue or relevant fact;

(2) if by themselves or in connection with other facts they make the existence or non-existence of any fact in issue or relevant fact highly probable or improbable.

*Illustrations.*

(a) The question is, whether A committed a crime at Calcutta on a certain day.

The fact that on that day A was at Lahore is relevant.

The fact that near the time when the crime was committed, A was at a distance from the place where it was committed, which would render it highly improbable, though not impossible, that he committed it, is relevant.

(b) The question is, whether A committed a crime.

The circumstances are such that the crime must have been committed either by A, B, C or D. Every fact which shows that the crime could have been committed by no one else and that it was not committed by either B, C, or D is relevant.

## 12. In suits in which damages are claim-

ed, any fact which will enable the Court to determine the amount of damages which ought to be awarded is relevant.

In suits for damages, facts tending to enable Court to determine amount are relevant.

13. Where the question is as to the existence of any right or custom, the following facts are relevant—

Facts relevant when right of custom is in question.

(a) Any transaction by which the right or custom in question was created, claimed, modified, redognized, asserted or denied, or which was inconsistent with its existence.

(b) Particular instances in which the right or custom was claimed, recognized, or exercised, or in which its exercise was disputed, asserted or departed from.

#### Illustration.

The question is, whether A has a right to a fishery. A deed conferring the fishery on A's ancestors, a mortgage of the fishery by A's father, a subsequent grant of the fishery by A's father, irreconcilable with the mortgage, particular instances in which A's father exercised the right, or in which the exercise of the right was stopped by A's neighbours, are relevant facts.

14. Facts showing the existence of any

Facts showing existence of state of mind, or of body or bodily feeling.

state of mind—such as intention, knowledge, good faith, negligence, rashness, ill-will or good-will towards any particular person, or showing the existence of any state of body or bodily feeling—are relevant, when the existence of any such state of mind or body or bodily feeling, is in issue or relevant.

*Explanation.*—A fact relevant as showing the existence of a relevant state of mind must show that it exists, not generally, but in reference to the particular matter in question.

#### Illustrations.

(a) A is accused of receiving stolen goods knowing them to be stolen. It is proved that he was in possession of a particular stolen article.

The fact that at the same time he was in possession of many other stolen articles is relevant, as tending to show that he knew each and all of the articles of which he was in possession to be stolen.

(b) A is accused of fraudulently delivering to another person a piece of counterfeit coin which, at the time when he delivered it, he knew to be counterfeit.

The fact that, at the time of its delivery, A was possessed of a number of other pieces of counterfeit coin, is relevant.

(c) A sues B for damage done by a dog of B's, which B knew to be ferocious.

The facts that the dog had previously bitten X, Y and Z, and that they had made complaints to B, are relevant.

(d) The question is whether A, the acceptor of a bill of exchange, knew that the name of the payee was fictitious.

The fact that A had accepted other bills drawn in the same manner before they could have been transmitted to him by the payee if the payee had been a real person, is relevant, as showing that A knew that the payee was a fictitious person.

(e) A is accused of defaming B by publishing an imputation intended to harm the reputation of B.

The fact of previous publications by A respecting B, showing ill-will on the part of A towards B, is relevant, as proving A's intention to harm B's reputation by the particular publication in question.

The facts that there were no previous quarrel between A and B, and that A repeated the matter complained of as he heard it, are relevant, as showing that A did not intend to harm the reputation of B.

(f) A is used by B for fraudulently representing to B that C was solvent, whereby B, being induced to trust C, who was insolvent, suffered loss.

The fact that, at the time when A represented C to be solvent, C was supposed to be solvent by his neighbours and by persons dealing with him, is relevant, as showing that A made the representation in good faith.

(g) A is sued by B for the price of work done by B, upon a house of which A is owner, by the order of C, a contractor.

A's defence is that B's contract was with C.

The fact that A paid C for the work in question is relevant, as proving that A did, in good faith, make over to C the management of the work in question, so that C was in a position to contract with B on C's own account, and not as agent for A.

(h) A is accused of the dishonest misappropriation of property which he had found, and the question is whether, when he appropriated it, he believed in good faith that the real owner could not be found.

The fact that public notice of the loss of the property had been given in the place where A was, is relevant, as showing that A did not in good faith believe that the real owner of the property could not be found.

The fact that A knew, or had reason to believe, that the notice was given fraudulently by C, who had heard of the loss of the property and wished to set up a false claim to it is relevant, as showing that the fact that A knew of the notice did not disprove A's good faith.

(i) A is charged with shooting at B with intent to kill him. In order to show A's intent, the fact of A's having previously shot at B may be proved.

(j) A is charged with sending threatening letters to B. Threatening letters previously sent by A to B may be proved, as showing the intention of the letters.

(k) The question is, whether A has been guilty of cruelty towards B, his wife.

Expressions of their feeling towards each other shortly before or after the alleged cruelty, are relevant facts.

(l) The question is, whether A's death was caused by poison.

Statements made by A during his illness as to his symptoms, are relevant facts.

(m) The question is, what was the state of A's health at the time when an insurance on his life was effected.

Statements made by A as to the state of his health at or near the time in question, are relevant facts.

(n) A sues B for negligence in providing him with a carriage for hire not reasonably fit for use, whereby A was injured.

The fact that B's attention was drawn on other occasions to the defect of that particular carriage, is relevant.

The fact that B was habitually negligent about the carriages which he let to hire, is irrelevant.

(o) A is tried for the murder of B by intentionally shooting him dead.

The fact that A, on other occasions, shot at B is relevant, as showing his intention to shoot B.

The fact that A was in the habit of shooting at people with intent to murder them, is irrelevant.

(p) A is tried for a crime.

The fact that he said something indicating an intention to commit that particular crime, is relevant.

The fact that he said something indicating a general disposition to commit crimes of that class, is irrelevant.

### 15. When there is a question whether an act was accidental or intentional, the fact that such act formed part of a series of similar occurrences, in each of which the person doing the act was concerned, is relevant.

Facts bearing on question whether act was accidental or intentional.

Each of which the person doing the act was concerned, is relevant.

#### Illustrations.

(a) A is accused of burning down his house in order to obtain money for which it is insured.

The facts that A lived in several houses successively, each of which he insured, in each of which a fire occurred, and after each of which fires A received payment from a different insurance office, are relevant, as tending to show that the fires were not accidental.

(b) A is employed to receive money from the debtors of B. It is A's duty to make entries in a book showing the amounts received by him. He makes an entry showing that on a particular occasion he received less than he really did receive.

The question is, whether this false entry was accidental or intentional.

The facts that other entries made by A in the same book are false, and that the false entry is in each case in favour of A, are relevant.

(c) A is accused of fraudulently delivering to B a counterfeit rupee.

The question is, whether the delivery of the rupee was accidental.

The facts that soon before or soon after the delivery to B, A delivered counterfeit rupees to C, D and E are relevant, as showing that the delivery to A was not accidental.

### 16. When there is a question whether a particular act was done, the existence of any course of business, according to which it naturally would have been done, is a relevant fact.

Existence of course of business when relevant.

#### Illustrations.

(a) The question is, whether a particular letter was despatched.

The facts that it was the ordinary course of business for all letters put in a certain place to be carried to the post, and that that particular letter was put in that place, are relevant.

(b) The question is, whether a particular letter reached A. The facts that it was posted in due course, and was not returned through the Dead Letter Office, are relevant.

#### ADMISSIONS.

17. An admission is a statement, oral or documentary, which suggests any inference as to any fact in issue or relevant fact, and which is made by any of the persons, and under the circumstances, hereinafter mentioned.

18. Statements made by a party to the proceeding, or by an agent to any such party, whom the Court regards, under the circumstances of the case, as expressly or impliedly authorized by him to make them, are admissions.

Statements made by parties to suits suing or sued in a representative character are not admissions, unless they were made while the party making them held that character.

Statements made by—  
(1) persons who have any proprietary or pecuniary interest in the subject-matter of the proceeding, and who make the statement in their character of person so interested, or

(2) persons from whom the parties to the suit have derived their interest in the subject-matter of the suit,

are admissions if they are made during the continuance of the interest of the persons making the statements.

19. Statements made by persons whose position or liability it is necessary to prove as against any party to the suit, are admissions if such statements would be relevant as against such persons in relation to such position or liability in a suit brought by or against them, and if they are made whilst the person mak-

Admissions by persons whose position must be proved as against party to suit.

ing them occupies such position or is subject to such liability.

*Illustration.*

A undertakes to collect rents for B.  
B sues A for not collecting rent due from C to B.  
A denies that rent was due from C to B.  
A statement by C that he owed B rent is an admission, and is a relevant fact as against A, if A denies that C did owe rent to B.

20. Statements made by persons to whom a party to the suit has expressly referred for information in reference to a matter in dispute are admissions.

Admissions by persons expressly referred to by party to suit.

*Illustration.*

The question is, whether a horse sold by A to B is sound.

A says to B—'Go and ask C, C knows all about it. C's statement is an admission.

21. Admissions are relevant and may be proved as against the person who makes them, or his representative in interest; but they cannot be proved by or on behalf of the person who makes them or by his representative in interest, except in the following cases:—

Relevancy of Admissions against or in behalf of persons concerned.

(1) An admission may be proved by or on behalf of the person making it when it is of such a nature that, if the person making it were dead, it would be relevant as between third persons under section thirty-two.

(2) An admission may be proved by or on behalf of the person making it when it consists of a statement of the existence of any state of mind or body, relevant or in issue, made at or about the time when such state of mind or body existed, and is accompanied by conduct rendering its falsehood improbable.

(3) An admission may be proved by or on behalf of the person making it if it is relevant otherwise than as an admission.

*Illustrations.*

(a) The question between A and B is, whether a certain deed is or is not forged. A affirms that it is genuine, B that it is forged.

A may prove a statement by B that the deed is genuine, and B may prove a statement by A that the deed is forged; but A cannot prove a statement by himself that the deed is genuine, nor can B prove a statement by himself that the deed is forged.

(b) A, the Captain of a ship, is tried for casting her away.

Evidence is given to show that the ship was taken out of her proper course.

A produces a book kept by him in the ordinary course of his business, showing observations alleged to have been taken by him from day to day, and indicating that the ship was not taken out of her proper course. A may prove these statements, because they would be admissible between third parties if he were dead under section thirty-two, clause (two).

(c) A is accused of a crime committed by him at Calcutta.

He produces a letter written by himself and dated at Lahore on that day and bearing the Lahore post-mark of that day.

The statement in the date of the letter is admissible, because, if A were dead it would be admissible under section thirty-two, clause (two).

(d) A is accused of receiving stolen goods knowing them to be stolen.

He offers to prove that he refused to sell them below their value.

A may prove these statements, though they are admissions, because they are explanatory of conduct influenced by facts in issue.

(e) A is accused of fraudulently having in his possession counterfeit coin which he knew to be counterfeit.

He offers to prove that he asked a skilful person to examine the coin, as he doubted whether it was counterfeit or not, and that that person did examine it and told him it was genuine.

A may prove these facts for the reasons stated in the last preceding illustration.

22. Oral admissions as to the contents of a document are not relevant unless and until the party proposing to prove them shows that he is entitled to give secondary evidence of the contents of such document under the rules hereinafter contained, or unless the genuineness of a document produced is in question.

When oral admissions as to contents of documents are relevant.

23. In civil cases no admission is relevant, if it is made either upon an express condition that evidence of it is not to be given, or under circumstances from which the Court can infer that the parties agreed together that evidence of it should not be given.

Admissions in civil cases when relevant.

*Explanation.*—Nothing in this section shall be taken to exempt any barrister, pleader, attorney or vakil from giving evidence of any matter of which he may be compelled to give evidence under section 126.

24. A confession made by an accused person is irrelevant in a criminal proceeding, if the making of the confession appears to the Court to have been caused by any inducement, threat or promise, having reference to the charge against the accused person, proceeding from

Confession caused by inducement, threat or promise irrelevant.

a person in authority and sufficient, in the opinion of the Court, to give the accused person grounds, which would appear to him reasonable, for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him.

25. No confession made to a Police officer, shall be proved as against a person accused of any offence.

*Confession made to a Police officer not to be used as evidence.*

26. No confession made by any person whilst he is in the custody of a Police officer, unless it be made in the immediate presence of a Magistrate, shall be proved as against such person.

*Confession made by accused while in custody of Police not to be used as evidence.*

27. Provided that, when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a Police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved.

*So much of statement or confession made by accused as relates to fact thereby discovered, may be proved.*

28. If such a confession as is referred to in section twenty-four is made after the impression caused by any such inducement, threat, or promise has, in the opinion of the Court, been fully removed, it is relevant.

*Confession made after removal of impression caused by inducement, threat or promise relevant.*

29. If such a confession is otherwise relevant, it does not become irrelevant merely because it was made under a promise of secrecy, or in consequence of a deception practised on the accused person for the purpose of obtaining it, or when he was drunk, or because it was made in answer to questions which he need not have answered, whatever may have been the form of those questions, or because he was not warned that he was not bound to make such confession, and that evidence of it might be given against him.

*Confession otherwise relevant not to become irrelevant because of promise of secrecy, &c.*

30. When more persons than one are being tried jointly for the same offence, and a confession made by one of such persons affecting himself and some other of such persons

*Consideration of proved confession affecting person making it and others jointly under trial for same offence.*

is proved, the Court may take into consideration such confession as against such other person as well as against the person who makes such confession.

#### Illustrations.

(a) A and B are jointly tried for the murder of C. It is proved that A said,—"B and I murdered C." The Court may consider the effect of this confession as against B.

(b) A is on his trial for the murder of C. There is evidence to show that C was murdered by A and B, and that B said,—"A and I murdered C." This statement may not be taken into consideration by the Court against A, as B is not being jointly tried.

31. Admissions are not conclusive proof of the matters admitted, but they may operate as estoppels under the provisions hereinafter contained.

*Admissions not conclusive proof, but may estop.*

#### STATEMENTS BY PERSONS WHO CANNOT BE CALLED AS WITNESSES.

32. Statements, written or verbal, of relevant facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense which, under the circumstances of the case, appears to the Court unreasonable, are themselves relevant facts in the following cases:—

(1) When the statement is made by a person, as to the cause of his death; or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question.

Such statements are relevant whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question.

(2) When the statement was made by or is made in such person in the ordinary course of business, and in particular when it consists of any entry or memorandum made by him in books kept in the ordinary course of business, or in the discharge of professional duty; or of an acknowledgment written or signed by him

*or is made in such person in the ordinary course of business.*

of the receipt of money, goods, securities or property of any kind; or of a document used in commerce written or signed by him, or of the date of a letter or other document usually dated, written or signed by him.

(3) When the statement is against the or against interest of maker; pecuniary or proprietary interest of the person making it, or when, if true, it would expose him or would have exposed him to a criminal prosecution or to a suit for damages.

(4) When the statement gives the or gives opinion as to public right or custom or matters of general interest; opinion of any such person, as to the existence of any public right or custom or matter of public or general interest, of the existence of which, if it existed, he would have been likely to be aware, and when such statement was made before any controversy as to such right, custom or matter had arisen.

(5) When the statement relates to the or relates to existence of relationship; existence of any relationship between persons as to whose relationship the person making the statement had special means of knowledge, and when the statement was made before the question in dispute was raised.

(6) When the statement relates to the or is made in will or deed of deceased person; existence of any relationship between persons deceased, and is made in any will or deed relating to the affairs of the family to which any such deceased person belonged, or in any family pedigree, or upon any tombstone, family portrait or other thing on which such statements are usually made, and when such statement was made before the question in dispute was raised.

(7) When the statement is contained in or relates to transaction mentioned in section 13, clause (a); any deed, will or other document which relates to any such transaction as is mentioned in section thirteen, clause (a).

When the statement was made by a number of persons, and expressed feelings or impressions on their part relevant to the matter in question.

#### Illustrations.

(a) The question is, whether A was murdered by B; or

A dies of injuries received in a transaction in the course of which she was ravished. The question is whether she was ravished by B: or

The question is, whether A was killed by B under such circumstances that a suit would lie against B by A's widow.

Statements made by A as to the cause of his or her death, referring respectively to the murder, the rape, and the actionable wrong under consideration, are relevant facts.

(b) The question is as to the date of A's birth.

An entry in the diary of a deceased surgeon, regularly kept in the course of business, stating that, on a given day, he attended A's mother and delivered her of a son, is a relevant fact.

(c) The question is, whether A was in Calcutta on a given day.

A statement in the diary of a deceased solicitor, regularly kept in the course of business, that, on a given day, the solicitor attended A at a place mentioned in Calcutta for the purpose of conferring with him upon specified business, is a relevant fact.

(d) The question is, whether a ship sailed from Bombay harbour on a given day.

A letter written by a deceased member of a merchant's firm, by which she was chartered, to their correspondents in London to whom the cargo was consigned, stating that the ship sailed on a given day from Bombay harbour, is a relevant fact.

(e) The question is, whether rent was paid to A for certain land.

A letter from A's deceased agent to A saying that he had received the rent on A's account and held it at A's orders, is a relevant fact.

(f) The question is, whether A and B were legally married.

The statement of a deceased clergyman that he married them under such circumstances that the celebration would be a crime, is relevant.

(g) The question is, whether A, a person who cannot be found, wrote a letter on a certain day. The fact that a letter written by him is dated on that day, is relevant.

(h) The question is, what was the cause of the wreck of a ship.

A protest made by the captain, whose attendance cannot be procured, is a relevant fact.

(i) The question is, whether a given road is a public way.

A statement by A, a deceased headman of the village, that the road was public, is a relevant fact.

(j) The question is, what was the price of grain on a certain day in a particular market. A statement of the price, made by a deceased banya in the ordinary course of his business, is a relevant fact.

(k) The question is, whether A, who is dead, was the father of B.

A statement by A that B was his son, is a relevant fact.

(l) The question is, what was the date of the birth of A.

A letter from A's deceased father to a friend, announcing the birth of A on a given day, is a relevant fact.

(m) The question is, whether, and when, A and B were married.

An entry in a memorandum book by C, the deceased father of B, of his daughter's marriage with A at a given date, is a relevant fact.



(a) A sues B for a libel expressed in a painted caricature exposed in a shop window. The question is as to the similarity of the caricature and its libellous character. The remarks of a crowd of spectators on these points may be proved.

**33. Evidence given by a witness in a judicial proceeding, or before any person authorised by law to take it, is relevant for the purpose of proving, in a subsequent judicial proceeding, or in a later stage of the same judicial proceeding, the truth of the facts which it states, when the witness is dead or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or if his presence cannot be obtained without an amount of delay or expense which, under the circumstances of the case, the Court considers unreasonable :**

**Provided**  
that the proceeding was between the same parties or their representatives in interest ;  
that the adverse party in the first proceeding had the right and opportunity to cross-examine ;  
that the questions in issue were substantially the same in the first as in the second proceeding.

**Explanation.**—A criminal trial or enquiry shall be deemed to be a proceeding between the prosecutor and the accused within the meaning of this section.

#### STATEMENTS MADE UNDER SPECIAL CIRCUMSTANCES.

**34. Entries in books of account, regularly kept in the course of business, are relevant whenever they refer to a matter into which the Court has to inquire, but such statements shall not alone be sufficient evidence to charge any person with liability.**

##### Illustrations.

A sues B for Rs. 1,000 and shows entries in his account books showing B to be indebted to him to this amount. The entries are relevant, but are not sufficient without other evidence to prove the debt.

**35. An entry in any public or other official book, register, or record, stating a fact in issue or relevant fact and made by a public servant in the discharge of his official duty, or by any other person in performance of a duty specially enjoined by the law of the country in which such book, register, or record is kept, is itself a relevant fact.**

**36. Statements of facts in issue or relevant facts, made in published maps and plans or maps or charts generally offered for public sale, or in maps or plans made under the authority of Government, as to matters usually represented or stated in such maps, charts or plans, are themselves relevant facts,**

**37. When the Court has to form an opinion as to the existence of any fact of a public nature, any statement of it, made in a recital contained in any Act of Parliament or in any Act of the Governor-General of India in Council, or of the Governors in Council of Madras or Bombay, or of the Lieutenant-Governor in Council of Bengal, or in a notification of the Government appearing in the *Gazette of India*, or in the *Gazette of any Local Government*, or in any printed paper purporting to be the *London Gazette* or the *Government Gazette* of any colony or possession of the Queen, is a relevant fact.**

**38. When the Court has to form an opinion as to a law of any country, any statement of such law contained in a book purporting to be printed or published under the authority of the Government of such country and to contain any such law, and any report of a ruling of the Courts of such country contained in a book purporting to be a report of such rulings, is relevant.**

#### HOW MUCH OF A STATEMENT IS TO BE PROVED.

**39. When any statement of which evidence is given forms part of a longer statement, or of a conversation or part of an isolated document, or is contained in a document which forms part of a book, or of a connected series of letters or papers, evidence shall be given of so much and no more of the statement, conversation, document, book, or series of letters or papers as the Court considers necessary in that particular case to the full understanding of the nature and effect of the statement, and of the circumstances under which it was made.**

## PART II.

## JUTE WAREHOUSES.

4. No jute warehouse, existing at the date of the commencement of this Act within the limits of its operation, shall be used after the 31st July next following such date for the storing, keeping, pressing, or depositing of jute or cotton, unless the owner or occupier thereof shall have previously obtained a license under this Act for such use.

5. As soon as may be after the passing of this Act the Justices at a special meeting shall appoint from their own number a special committee, consisting of seven members, one of whom must be the Chairman of the Justices, whose duty it shall be to visit, inspect, and report on every jute warehouse existing within the town of Calcutta. And the special committee shall report before the 15th day of the said month of July to the Justices whether a license can be granted to all or any such warehouses without risk to life and property in the neighbourhood thereof respectively. No jute warehouse shall be reported upon by the special committee until it shall have been visited by a quorum of not less than three members of the special committee. The Justices at a special meeting may award such fee as they may think fit to each member of the special committee, not being a salaried member of the corporation of Justices.

6. On receiving the report of the committee it shall be within the discretion of the Justices at a special meeting to grant or refuse a license for any jute warehouse mentioned in the said report. Provided that if in the opinion of the Justices the said jute warehouse may be rendered fit for use without risk to life or property in the neighbourhood thereof the Justices shall certify to the owner and occupier thereof the conditions and restrictions under which the said jute warehouse may in their opinion be so rendered fit for use, and upon the said owner or occupier complying with the terms of such conditions and restrictions to the satisfaction of the Justices at a special meeting they shall grant to him a license in respect thereof. Every license granted under this section

shall be subject to the payment of an annual fee to be imposed and paid in manner as in the next succeeding section is directed, and to such other of the conditions mentioned therein as the Justices may think fit.

7. Any person proposing to establish a new jute warehouse within the town of Calcutta shall send to the Justices a plan of the warehouse so proposed to be established, and it shall be within the discretion of the Justices at a special meeting to grant or refuse a license to establish the same.

Every license for a jute warehouse granted under this section shall be subject to the following conditions, viz:—

(1.) That no loose jute, jute rejections or cuttings, or cotton, shall be stored or scrowed, or pressed or combed or dried, save within a building, the walls of which shall be of burnt bricks or of stone or of iron, and all the roof of which, including the beams on which such roof rests, shall be of iron, or of masonry or of tiles;

(2.) That such jute warehouse and the buildings thereon shall be supplied with solid doors or gates which can be securely closed;

(3.) That no portion of such jute warehouse shall be used as a residence, and no artificial light or lucifer matches shall be introduced therein, and that no person shall smoke therein;

(4.) That such jute warehouse shall be at any time open to inspection;

(5.) That the engines and furnaces used in such jute warehouse shall be placed as may be considered necessary for safety by the Justices;

(6.) That an annual fee, as the Justices at a special meeting may think fit, shall be imposed in respect thereof at one of the following rates, viz:—

Rupees	...	1,000
"	...	750
"	...	500
"	...	250

and shall be paid in such instalments as the Justices may direct.

In fixing the amount of fee to be paid in respect of any jute warehouse, the Justices at such special meeting shall have regard to the annual value thereof as it is for the time being assessed to the payment of municipal taxes, to the size and position of the jute warehouse, to the number and excellence of the



pressing machines erected in such jute warehouse, and to the probable income derived from such jute warehouse by its occupier or owner.

(7.) Such other special conditions as the Justices may, on consideration of the special circumstances of such jute warehouse, deem necessary to prevent risk to life and property in the neighbourhood.

8. The Justices shall appoint suitable Appointment of officers for the inspection of inspecting officers. jute warehouses within the town of Calcutta; and it shall be lawful for any officer so appointed, and for any superintendent or inspector of police within the said town, to enter at any time into any jute warehouse, where jute or cotton may be kept, and to inspect the same.

9. It shall be in the discretion of the Breach of conditions. Justices at a special meeting to cancel, or to suspend for such time as they shall think fit, the license of any jute warehouse in respect of which any one or more of the conditions under which such license has been granted shall appear to them to have been broken.

10. In regard to any jute warehouse Municipal Commissioners to have the same powers as Justices. situated or used or proposed to be established or used out of the town of Calcutta and within the limits of the operation of this Act, the powers and duties conferred and imposed by this Part, and by every section thereof upon the Justices, or the Justices at a special meeting, shall be exercised and discharged by the Municipal Commissioners, or the Municipal Commissioners at a meeting respectively within whose jurisdiction such jute warehouse is situated. The annual fee in respect of any license for a jute warehouse granted by the said Municipal Commissioners may be at the rate of Rs. 150, or at any one of the rates mentioned in section 7, clause 6.

#### Penalties.

11. Any person who shall after the 31st Penalty for not taking out license. day of the said July without a license under this Act use any jute warehouse, for keeping or depositing jute or cotton, shall be liable, on conviction before a Magistrate, to a penalty not exceeding one hundred rupees for each day during which he may use or continue to use such jute warehouse as aforesaid.

12. Any person who shall without a Penalty for establishing warehouse without license. license use any jute warehouse, for keeping or depositing jute or cotton established after the commencement of this Act shall be liable, on conviction before a Magistrate, to a penalty not exceeding five hundred rupees, and to a further penalty not exceeding fifty rupees for every day during which such jute warehouse is used for keeping or depositing jute or cotton without a license.

13. Any person who shall after the 31st Penalty for using warehouse after refusal of license. day of the said July use a jute warehouse for the keeping or depositing of jute or cotton after the Justices or Municipal Commissioners shall have refused or cancelled a license in respect thereof, or during the time for which such license shall have been suspended, shall be liable, on conviction before a Magistrate, to a penalty not exceeding five hundred rupees, and to a further penalty not exceeding one hundred rupees for every day during which any such jute warehouse may be so used as aforesaid.

14. Whoever in contravention of the Penalty for introducing fire, &c. license shall introduce or use in any jute warehouse, in which jute or cotton is kept or deposited, any fire or lucifer matches or shall smoke therein, and whoever shall violate any of the conditions or restrictions under which the said license is granted, shall be liable on conviction before a Magistrate to a penalty not exceeding fifty rupees for any one such offence.

### PART III.

#### FIRE-BRIGADE.

15. Within six months from the date of Organization of the fire-brigade. the passing of this Act the Justices shall organize and thereafter maintain an efficient fire-brigade for the town and suburbs of Calcutta.

All existing public fire-engines, with the establishments and buildings thereto belonging, except those belonging to the Military Department or to the Port Commissioners incorporated under Act V of 1870, shall be transferred to the fire-brigade to be established under this Act. The Justices shall have power to appoint and remove any members

or officers of the fire-brigade; and they shall furnish the fire-brigade with all such steam or other fire-engines, horses, oxen, accoutrements, tools, and implements, as may be necessary for the complete equipment of the force, or conducive to the efficient performance of their duties.

16. The Justices at a special meeting

Power to frame Bye-laws. may frame bye-laws in respect of the following subjects:—

(1.) Giving of gratuities to persons who have given notice of fires.

(2.) Awarding gratuities by way of a gross sum or annual payment to be from time to time awarded to any member of the fire-brigade or other person specially deserving of reward.

(3.) For the training, discipline, and good conduct of the members of the force; not being members of the Calcutta and Suburban Police force.

(4.) For the speedy attendance of such members with engines and all necessary implements on the occasion of any alarm of fire.

(5.) Imposing and summarily realizing a fine not exceeding one week's wages from any member of the brigade who may infringe these bye-laws.

(6.) And generally for the maintenance of the fire-brigade in a due state of efficiency.

17. On the occasion of a fire, the chief

Powers of fire-brigade in cases of fire. or other officer in charge of the fire-brigade on the spot may remove, or may order

any member of the brigade to remove any persons whose presence shall interfere with the due operation of the brigade; and generally, he may take any measures which may appear necessary for the preservation of life and property; and he shall have power by himself or by his men to break into or through or pull down any premises for the purpose of putting an end to the fire, doing as little damage as possible; and he may also cause the mains and pipes of any district to be shut off so as to give greater pressure of water in the place where the fire has occurred. He may also call on the officer in charge of the Port Commissioners' fire-engine to render such assistance as may be possible in the case of any fire occurring near the river bank. The chief officer on the spot in charge of the brigade may ver-

bally nominate and depute one or more officers of the brigade to act at a distance, and such officer or officers shall have for the time being the like powers as the chief officer himself possesses under this section.

Police officers of all grades shall be authorized to aid the fire-brigade in the execution of its duties.

Police officers to render assistance. They may close any street in or near which a fire is burning, and they may, of their own motion or on the request of the chief or other officer of the fire-brigade, remove any persons who interfere by their presence with the operations of the fire-brigade.

Any damage done by the fire-brigade in the due execution of their duties shall be deemed to be damage by fire within the meaning of any policy of insurance of property in Calcutta or the suburbs against fire.

But nothing in this section shall exempt any officer of the police or of the fire-brigade from liability to damages on account of any acts done by him without reasonable cause.

18. In the case of any fire occurring in

Inquiry into origin of fire. Calcutta or the suburbs the chief officer of the fire-brigade shall ascertain the facts as to the origin and cause of such fire and shall make a report thereon to the Magistrate having jurisdiction in the place in which such fire shall have occurred, and the said Magistrate, in any case where he may see fit, shall summon witnesses and take evidence in order to the further ascertainment of such facts.

#### LICENSES AND PENALTIES.

19. No person shall let off rockets or

License for using fire-works. send up fire-balloons in the town or suburbs of Calcutta without a license from the Commissioner of Police, for which license a fee of ten rupees shall be payable.

20. No person shall sell or manufacture

License of sale or manufacture thereof. fire-works in the town or suburbs of Calcutta without a license from the Commissioner of Police, for which a yearly fee of ten rupees shall be payable in advance.

21. Whoever shall let off rockets or

Penalty for using without license. send up fire-balloons in the town or suburbs of Calcutta without a license as aforesaid shall be liable, on conviction before a Magistrate, to a penal-

ty not exceeding fifty rupees for any one such offence.

22. Whoever shall sell or manufacture fire-works in the town or suburbs of Calcutta without a license as aforesaid shall be liable, on conviction before a Magistrate, to a penalty not exceeding fifty rupees.

23. The Commissioner may at his discretion, and after thirty days' notice, withdraw or suspend any license granted by him under this Act.

24. In the event of any rockets being let off, or fire-balloons sent up within the precincts of any private premises or compound within the town or suburbs of Calcutta, without the express permission in writing of the Commissioner of Police, the occupier, or owner, or person under whose immediate control the said premises or compound is, shall be liable to a fine not exceeding fifty rupees, unless he can prove who the person having committed the offence is, and that the offence was committed without his knowledge.

#### PART IV.

##### EXPENSES AND FUNDS.

25. The Justices and Municipal Commissioners respectively shall apply the moneys derived from the fees and penalties levied under this Act within their respective jurisdictions in payment of all expenses incurred by them respectively in or about the inspection and superintendence of jute warehouses, and the granting of licenses in respect thereof. In the case of Calcutta and the suburbs, the balance of such monies after payment of the said expenses shall be paid to the credit of an account in the books of the Justices to be called the fire-brigade account.

26. Every Insurance Company that insures from fire any property within the town and suburbs of Calcutta shall pay annually to the Justices, by way of contribution towards the expenses of the said fire-brigade, a sum at the rate of half a rupee for every ten thousand rupees on the gross

amount insured by it in respect of such property. All sums paid to the Justices under this section shall be credited to the fire-brigade fund. The said payments shall be made quarterly in advance, on such dates as the Justices may appoint: and arrears on account of these payments shall be realizable as if they were arrears of rates due to the Justices, and all the provisions of Act VI of 1863 (passed by the Lieutenant-Governor of Bengal in Council) and of any Act amending the same shall be applicable so far as the circumstances will permit to the recovery of moneys due under this section.

27. For the purpose of ascertaining the amount to be contributed by every such Insurance Company as aforesaid, every Insurance Company insuring property from fire within the town and suburbs of Calcutta shall, on the 30th day of June 1872, and on every succeeding 30th day of June, or on such other days as the Justices may appoint, make a return to the said Justices, in such form as they may require, of the gross amount insured by it in respect of property within the said town and suburbs. At the foot of every such return shall be appended a certificate by the Secretary or chief officer or manager of such Insurance Company in Calcutta, stating that to the best of his knowledge and belief the return contains a true and faithful account of the sums insured by the Company to which he belongs in respect of such property. Such Secretary or chief officer or manager shall allow either the Chairman or the Vice-Chairman or the Secretary to the Justices to inspect at any time during the hours of business any books and papers that will enable him to ascertain the correctness of the return; and every Secretary or chief officer or manager as aforesaid failing to comply with the requisition of this section in respect of such inspection shall be liable, on conviction before a Magistrate, to a penalty not exceeding fifty rupees for each offence. The Justices on receiving the report of such inspection may alter the return accordingly.

The return made in the June of one year, or such return as altered on inspection by the Justices, shall be the basis of the contributions for the year beginning on the first day of January next succeeding.

# ACTS

OF THE

## COUNCIL OF THE LIEUT.-GOVERNOR OF BENGAL

ACT No. I of 1872.

*An Act to extend the borrowing powers of the Justices of the Peace for the Town of Calcutta, and to provide for the repayment of municipal debt.*

WHEREAS it is expedient to increase the amount which the Justices are authorized to borrow, by way of debentures or otherwise, under the provisions of Section 9 of Act IX of 1867, passed by the Lieutenant-Governor of Bengal in Council, and whereas it is expedient to provide for the repayment of municipal debentures and loans; it is hereby enacted as follows:—

1. In the said section, for the words “sum of fifty-five lakhs of rupees,” wherever such words occur, shall be substituted the words “sum of eighty-five lakhs of rupees”; and the said section shall be hereafter read and construed as if the words hereby directed to be substituted were inserted in place of the words for which they are hereby directed to be substituted.

2. So soon as the aggregate sums from time to time borrowed by the Justices by way of debenture or otherwise, exclusive of any sums now due by them to the Secretary of State for India in Council, shall amount to the said sum of eighty-five lakhs of rupees, the borrowing powers of the Justices shall thereupon cease and determine, save so far as they are hereinafter expressly reserved.

3. The Justices shall be bound to set aside yearly out of their annual income, before making any disbursements in respect thereof, a sum of not less than two per cent. on the total sum borrowed by the Justices, exclusive of the sum now due by them to the Secretary of State for India in Council, and shall appropriate the same, so far as it is required

or will extend, to repay the amount (if any) of such loans or debentures issued by them as shall fall due in the course of the year. And they shall invest the surplus (if any) of the said sum after repayment as aforesaid; or in case there has not been any amount due or paid in respect of such loans or debentures during the year, then they shall invest the whole of the said sum; in Government securities or in any securities guaranteed by Government or in Calcutta Municipal debentures in the names of the Secretary to the Government of Bengal in the Revenue Department and the Accountant-General of the Government of Bengal, respectively for the time being, to be by them held as Trustees for the purpose of repaying at due date from time to time the several loans contracted or debentures issued by the Justices. And all moneys and securities now held by any Trustees appointed by the said Justices for the purpose of paying off any portion of the said fifty-five lakhs shall be forthwith transferred to the Trustees under this Act, and invested in their names and held by them upon the trusts hereinbefore declared. All interest accruing due to the Trustees shall also from time to time be invested by them in like manner and held upon the like trust.

4. It shall be the duty of the Trustees Appropriation of from time to time, whenever reserve fund. any loans or debentures shall fall due by the Justices, to realize the whole or a sufficient portion of the securities held by them as aforesaid, and appropriate the sale proceeds thereof, so far as the same will extend, to satisfy such loans or debentures. In case any balance in respect of such loans or debentures so falling due as aforesaid shall remain unsatisfied after appropriation thereto of the sale proceeds of the whole of such securities, then the Justices may, for the purpose of paying such unsatisfied balance, issue new debentures in manner as is provided by Act VI of 1863, passed by the Lieutenant-Governor of Bengal in Council,

section 93, clause 3, or otherwise contract new loans for any sum not exceeding such amount as may be necessary for the purpose aforesaid.

5. The Trustees shall at the end of every year submit a statement to the Justices showing the amount which has been invested during the year under the third section of this Act, and setting forth the date of the last investment made previous thereto, and also the aggregate amount of the securities then in their hands, and the aggregate amount which has up to the date thereof been paid off in respect of the said debentures and loans. Such statement shall be laid before the Justices and published in the *Calcutta Gazette*.

6. This Act shall be read with and as part of Act VI of 1863, passed by the Lieutenant-Governor of Bengal in Council, and of the said Act IX of 1867.

HERBERT COWELL,

*Asst. Secy. to the Govt. of Bengal.*

*Legislative Department.*

#### ACT No. II of 1872.

*An act to amend the law for the registration of Jute Warehouses and to provide for the establishment of an efficient Fire-brigade.*

WHEREAS it is expedient to amend so much of Act VI of 1866, passed by the Lieutenant-Governor of Bengal in Council, as provides for the registering and licensing of jute warehouses; and whereas it is expedient to provide for the organization and maintenance of a Fire-brigade; it is hereby enacted as follows:—

#### PART I.

##### PRELIMINARY.

1. This Act may be called "The Jute Warehouse and Fire-brigade Act, 1872."

Short title.

It extends to the whole of the town of Calcutta, and to such portions of the Suburbs thereof as are for the time being subject to the operation of Act II of 1866, passed by the Lieutenant-Governor of Bengal in Council, and also to the Municipality of Howrah. And it shall commence and take effect, except in the Municipality of Howrah, immediately upon the passing thereof. In the said Municipality it shall commence and take effect from such date as the Lieutenant-Governor may direct by notification published in the *Calcutta Gazette*.

2. The words mentioned in this section shall for the purposes of Interpretation. this Act have the meanings herein assigned to them, except when from the context a contrary intention appears.

"Jute" and "Cotton" mean respectively "Jute" and "Cotton" which have not been pressed or screwed as if for shipment.  
"Person." "Person" includes a firm and a Hindu undivided family.

"Insurance Company" means any Association or person who may carry on the business of fire insurance, whether such Association be incorporated or not, and the agent or agents of such Association or person.

"Magistrate" includes a Justice of the Peace for Calcutta, and any person exercising all or any of the powers of a Magistrate.

"Jute Warehouse" means any warehouse, store, dépôt, yard, godown or other place used for the storing, keeping, pressing or depositing of jute or cotton or other substance for the time being subject to the operation of this Act.

3. From and after the 31st July next after the passing of this Act, sections 38, 39, 40, and 41, of Act VI. of 1866, passed by the Lieutenant-Governor of Bengal in Council, are hereby repealed, but such repeal shall not affect any registration made, or any act or offence done or committed, or any penalty or liability incurred under the said sections.

# CIVIL RULINGS

## Rulings of the High Court, Bengal.

IN THE HIGH COURT OF JUDICATURE AT FORT  
WILLIAM IN BENGAL.

28th May 1872.

Present:

Hon'ble L. S. JACKSON, } *Judges of the High*  
" W. MARKY, } *Court.*

### REGULAR APPEAL

No. 281 of 1871.

*From a decision of the Second Subordinate  
Judge of the Twenty-four-Pergunnahs, dated  
the 27th September 1871.*

Sreemoty Sreemoty Dossee } *Defendants,*  
and Sreemoty Bhuggomo- } *Appellants.*  
ny Dossee ... ..

*versus*

Sreemoty Soudaminy Dos- } *Plaintiff,*  
.. .. } *Respondent.*

APPEAL LAID AT RS. 2,500.

*Construction of Section 22 Act VI of 1871.*

It appears that plaintiff sued *in forma pauperis* to recover possession by right of inheritance of her share under the Hindu Law in a joint family estate with mense profits, valuing the lands at Rs. 7,926 and the mense profits at Rs. 4,417-0-16 gundas, and thus laying her suit at Rs. 12,343-0-16 gundas.

The defendants, among other reasons, objected to the suit on the ground of over-valuation.

One of the issues accordingly was :—

“Whether there has been any over-valuation of the claim, and, if so, to what extent?”

With reference to this issue the Court of first instance observed :—

“It appears from the witnesses that the mal lands yield a profit of eight annas per bigga, and the luckheraj lands of two Rupees per bigga, and that the selling price of a bigga of mal land is Rupees ten, and of a bigga of lackheraj land is Rupees thirty. Calculating at the rate of the selling price, the fair valuation of the mal lands would be about two thousand Rupees and of the lackheraj lands about five hundred Rupees. This, with Rupees four thousand four hundred and seventeen for wasilat, would make the true valuation of the claim at Rupees six thousand nine hundred and seventeen, which is accordingly fixed as the valuation of the suit upon which costs would be allowed to the parties.”

The first Court then went into the merits of the case, and decreed the plaintiff's suit for possession of the lands with mense profits from the date of suit.

The defendants appealed to the High Court, laying the appeal at Rs. 2,500.

Upon the case coming on for hearing as a Regular Appeal, the Court of its own motion held that no Regular Appeal lay to the High Court, and accordingly the following judgment was recorded :—

JACKSON (MARKBY concurring).

Under Section 22 of Act VI of 1871, the appeal ought to have been preferred in the Court of the District Judge, in as much as the subject matter in dispute does not exceed five thousand Rupees in value.

The case must be sent down to the District Judge.

In the High Court of Judicature at Fort  
William in Bengal.

THE 17TH MAY 1872.

Present:

The Hon'ble F. B. KEMP,

" " F. A. B. GLOVER,

Two of the Judges of the Court.

CASE NO. 91 OF 1871.

Regular Appeal from a decision passed by the  
Subordinate Judge of Beerbhoom, dated the  
16th January 1871.

Chowdhry Herasutoollah, father and guardian of Rufe-  
tunnissa, minor daughter of } Defendant,  
the late defendant Khodeh- } Appellant,  
junnissa Beebee ... }

versus

Brojo Soonder Roy and } Plaintiffs,  
others ... } Respondents.

The factum of the adoption being admitted or not questioned, it rests with the opposite party to prove that the ceremonies necessary to render that adoption valid were omitted or not performed.

Recitals in a deed are ordinarily no evidence of the facts recited; and where such recitals are found in old deeds duly registered and published; when the consideration paid is found to have been a fully adequate one, and when the conduct and long silence of the revertoner, after the death of the last life-tenant, raise a presumption, which is not rebutted, that those recitals were true and bona fide, Courts should not disturb the long possession of the alienees holding under such deeds.

SUIT LAID AT RS. 15,037-8.

MR. JUSTICE GLOVER.—This was a suit by the plaintiffs calling themselves the reversionary heirs of Radhagovind Rai to recover certain landed property from the hands of the defendants to whose predecessors it had been illegally sold by Kanchanmonee Dasseé, the widow of the said Radhagovind. The plaintiffs allege that the widow having only a life interest in the estate was incompetent to alienate any part of it except for such proved necessity as the Hindu Law allows, and that there was, in fact, no such necessity. The plaintiff are the sons of Benode Lall Rai, who in the genealogical tree at the head of the plaint is set down as the son of Shamsunder Rai, but who in the plaint itself is ascribed as the great grandson of Kanchanmonee's father-in-law. They claim two items of property—No. 1 Mouzah Govindpore sold by Kanchanmonee to Mirza Akbar Alee on the 25th Cheyt 1225 B. S., corresponding with April 1819 A. D., for Rs. 6,001; and No. 2, Turuf Jogye, to Atabur Hossein on the 7th of Kartick 1277 B. S., or October 1820, for Rs. 10,500.

Property No. 1, also, was afterwards sold to Atabur Hossein, and his descendants are the present defendants.

The defendants replied (1) that Benode Lall Rai was not the son of Shamsunder, and that the plaintiffs therefore had no *locus standi*, (2) that the suit was barred by limitation, and (3) that their ancestor purchased the property for valuable consideration in good faith, believing that the widow had the right to sell in consequence of a legal necessity.

On the back of this written statement there is a note by the Subordinate Judge to the effect that the defendants through their Vakeel qualified their allegation regarding Benode Lall Rai; they admitted that he was an adopted son of Shamsunder Rai, but denied that the usual ceremonies enjoined by Hindu Law in cases of adoption had been carried out.

Kanchanmonee Dasseé died at Brindabun, in the district of Muttra, N. W. Provinces, many years after the alienations were made. The date of her death is alleged by the plaintiff to have been the 4th of Jyst 1266 B. S. There was a good deal of argument in the Court below as to her position at Brindabun, the defendants alleging that she had become a Boystubee and had in consequence retired from all worldly associations. The Subordinate Judge found no proof of such retirement, and the question was not pressed before us in appeal.

The Subordinate Judge fixed and tried five issues, two in Bar, *viz.*, champerty and limitation, and three on the merits.

(1) Whether Benode Lall Rai was the adopted son of Shamsunder according to the requirements of Hindu Law?

(2) Whether Kanchanmonee got the property as heiress of her husband Radhagovind, or in gift from him? And

(3) Whether the sales by Kanchanmonee were made for such necessity as the Hindu Law recognizes and allows?

The first issue was fixed in consequence of the interference in the suit of a Vakeel named Dwarka Nath Chuckerbutty, with whom the plaintiffs had on the 27th of Magh 1276, entered into an agreement stipulating to give him a 6-anna share of any property recovered from the defendants; Dwarka Nath Chuckerbutty carrying on the suit on their behalf at his own expense. Whilst the suit was pending the Vakeel withdrew, or alleged that he withdrew his aid from the plaintiffs



and both parties filed a petition to that effect. On reading that petition, the Subordinate Judge rejected the defendants' plea of champerty and disposed of the issue in favor of the plaintiffs.

On the second issue in Bar, he found that Kanchanmonee died on the 3rd Jyst 1266, and that this suit instituted on the 30th Bysakh 1277 was therefore in time.

On the merits he found (1) that Benode Lall Rai was adopted in due form and that the plaintiffs were therefore the heirs of Kanchanmonee; (2) that Kanchanmonee took the property as heiress of her husband, and not by gift from him; and (3) that the defendants had failed to prove the necessity for the sales.

The result was a decree for the plaintiffs with costs and interest.

The defendants appeal on the following grounds:—

(1) The plaintiffs' suit is barred by limitation.

(2) There is no proof of Benode Lall Rai's legally valid adoption.

(3) The plea of legal necessity for the sales has been sufficiently proved.

The petition of appeal consists of thirteen clauses, but these three sufficiently include all the points which we shall have to consider.

On the first point, Mr. Woodroffe on behalf of the appellants contends that as the plaintiffs have brought their suit admittedly eleven years after Kanchanmonee's death, the burthen of a very distinct proof is upon them to show the precise date of that death, and that they come within 12 years of that date. He contends that the evidence adduced by the plaintiffs on this point is altogether insufficient and unsatisfactory.

We have had this evidence read to us, and it appears to me worthy of credit. It is the evidence of witnesses entirely unconnected with either party to this suit, and who can have no sort of interest one way or the other. It is corroborated in the strongest manner by the Khatta Books of the Idol House of Brindabun for 1265-66 B. S., and I think it proves that Kanchanmonee died at Brindabun on the 3rd or 4th of Jyst 1266. It cannot be supposed that these books were interpolated or fabricated for the purposes of this suit. Something was made of a supposed discrepancy between the Brindabun Books and the Bashora House accounts filed by the plaintiffs. In the former the death of Kanchanmonee is mentioned as having taken

place in Jyst 1266, whilst various items of expenditure on account of her Shrad are entered in the plaintiffs' accounts as having been disbursed in Assar 1265. I think that Mr. Branson's explanation of this discrepancy, viz., that zemindaree accounts are made up according to the "Punya" is a reasonable one; and it seems quite clear that if the Bashora accounts had been open to the objection now taken, such objection would have been strongly urged in the Court below, where the mistake would have attracted immediate notice. The only reasonable explanation of nothing having been made of this apparent discrepancy between the two accounts, is that nothing could be made of it, and that the difference of date was explicable by the different way in which the two Khattas were kept.

On this part of the case I think that the Subordinate Judge was fully justified in finding that Kanchanmonee died in Jyst 1266, and that from the date of the succession opening out to them, the plaintiffs have brought their suit within the Statute limit of 12 years.

Another point in connection with the issue of limitation was raised by Mr. Woodroffe to the effect that there was evidence to show that Kanchanmonee took the property in dispute as Shebait of the Idol during Radha Govind's lifetime, and that her position therefore was not that of a Hindoo widow at all; and that if this were so, Kanchanmonee's possession was from the first adverse to the members of Radha Govind's family, and that the period of limitation ran out even before Kanchanmonee retired to Brindabun.

There is no sufficient evidence I think that Kanchanmonee took the properties as Shebait of an idol. That the Hoodah might have been originally purchased in the name of an idol is likely enough; but there is nothing to show that the estate was ever considered or treated as endowed property. On the contrary, we find the purchaser, Radha Govind, within a few days of the Government auction, sale, disposing of one of the mouzahas (Hurra-rampore) of the Hoodah to Sham Soonder Rai.

Moreover, in the deed of sale of Kartick 7th 1227, Kanchanmonee describes the property as the self-acquired property of her husband. In the other deed of sale, dated Bysakh 1226, there is no doubt a recital to the effect that the Hoodah is recorded in Kanchanmonee's name in conjunction with the idol,



but this would not be evidence of the fact that she was in possession of the zemindaree on an independent title. On this point I see no reason to differ from the finding come to by the Subordinate Judge.

We now come to the question of the adoption of Benode Lall Rai; and Mr. Woodroffe contends that the Subordinate Judge was mistaken in the supposing that the defendants' vakeel made any such admission as is recorded on the back of the defendants' written statement. Mr. Woodroffe admits that if authority to adopt be proved, it would be for his clients to show that an adoption made under that authority was invalid by reason of any of the requisite ceremonies having been omitted. The point has been ruled in *Saloo Bewa versus Mahajun Maitee*, 2 Ben., App. 51.

It seems to me impossible to hold that there was any contention in the Court below, either as to the authority to adopt, or as to the factum of the adoption. The Subordinate Judge was a native gentleman conducting the trial in his own language, and it cannot be supposed that he made any mistake as to the admission made by the defendants' vakeel. The body of the written statement contains a distinct denial of the fact that Benode Lall Rai was the son of Ram Soonder at all, and this is afterwards qualified by the vakeel conducting the case by an explanation that what was meant was that Benode Lall was not the son of the loins of Sham Soonder, but that he was an adopted son of his, albeit the adoption was not valid in consequence of the omission of the necessary ceremonies. Had the Subordinate Judge been mistaken on this point, there would have been an immediate objection taken to the issue fixed by him, which was whether Benode Lall Rai had been adopted according to the Hindoo Shastras, meaning thereby with due ceremonial observances, and after his decision there would no doubt have been an application to admit a review of judgment, had the Subordinate Judge's mistake given the defendants such a good ground for objection.

It seems clear, moreover, from the nature of the questions put to the plaintiff's witnesses, that the point at issue was not the adoption itself, but whether that adoption was properly carried out; and there is a considerable body of evidence to the fact that Benode Lall Rai performed the Shraddha both of Sham Soonder and of his widow Aparmonnee;

and was in possession of the family property after Sham Soonder's death.

This being so, it was for the defendant to prove that the adoption was bad for want of the necessary ceremonies, and it is not too much to say that they have not made the slightest attempt to do so. Their witnesses speak to the fact of a general belief that Benode Lall Rai was adopted, and one of them says distinctly that Benode Lall was adopted, but none of them put forward any doubt as to the adoption's being valid by reason of the omission of ceremonies; and when we find that Benode Lall acted for many years as the adopted son, without objection taken by any one, that he died possessed of his adopting father's property, and performed his Shraddha, the presumption is of the strongest that the adoption was a valid one. At all events, it was for the defendants to show that it was not. Therefore on this point also I agree with the Subordinate Judge.

The third objection is really the substantial one, namely, that there is sufficient proof on the record that the sales were made by Kanchanmonee for such necessities as the Hindoo Law allows. Mr. Woodroffe, however, contends that under the very peculiar circumstances of this case, it was for the plaintiffs to show why a quiet, and *bona fide* possession of 50 years should be disturbed, and that the onus of proving that there was no necessity for the sales rested with the plaintiffs.

It seems to me that no precise rule can be laid down in cases like this, but that each case should be decided according to its own peculiar circumstances. Ordinarily, a reversioner would be entitled to call upon a purchaser to show that he had made enquiry before buying, and had satisfied himself of the existence of the alleged necessity. But in this case direct proof of such enquiry and of such satisfaction is impossible. The sales were effected in 1225 and 1227 B. S., corresponding with 1819 and 1820 A. D. or more than 50 years ago, and the property itself is now in the third line of descent from the original purchasers. It has been said that the fact of there being Government revenue due at the time, and that the estate was on the point of being put up for sale in consequence of such default, were matters that could have been easily proved on the part of the defendants by a reference to the

Collector's office,\* but this is a mistake. Records of this unimportant kind are by the orders of Government destroyed within a few years, and the papers now in question must undoubtedly have been destroyed many years ago. The original purchasers are dead and they would have been the only persons who could have given direct evidence of there having been a full and satisfactory enquiry as to the existence of a legal necessity on Kunchumonee to sell. Mr. Woodroffe argues that the recital in the deeds, that Government revenue was due, and that the estate was going to be sold in consequence, is in itself proof of the legal necessity, and the case of Omesh Chunder Sirkar *vs.* Digumberes Dassee (111 Weekly Reporter 154) has been quoted in support of the proposition. I do not think that the case in question decides this point. There is a remark no doubt in the judgment that a recital in a deed is "one species of evidence" but the case was not decided on the evidence afforded by any such recital.

It has been held however in Rajaram Tewaree *vs.* Luchmun Pershad XII, Weekly Reporter 478, that a recital in a deed of sale which if true, shewed that there was a necessity for borrowing made it incumbent on the Court trying the case to raise an issue on the subject, but this was done in the present case. The Privy Council in the case of Rajluki Debea, *vs.* Gokul Chunder Chowdree (3 Ben; P. C. 57) have laid it down that a recital in a deed of sale by a Hindu widow is not of itself evidence of necessity, and this I take to be the settled law of the question.

But there may be circumstances as stated in the Privy Council decision just quoted that may raise a presumption that the transaction was a fair one, and justified by Hindu Law, although direct proof of necessity may be wanting.

In the well known case of Hunooman Pershad Panday *vs.* Musst. Rabooe Mundraj Koor VI Moore 393, the Privy Council ruled that a lender is bound to enquire into the necessities of the loan and to satisfy himself as well as he can, and if he does enquire and acts honestly the real existence of an alleged and reasonably credited necessity is not a condition precedent to the validity of his charge, and a gain that the presumption in such cases varies with circumstances and is regulated and dependent upon them.

Now the best test of the good faith of the

purchasers of these properties and of their having satisfied themselves that there was such a necessity upon Kunchanmonee as would justify her in selling and them in advancing their money would be found in apprehend in the sufficiency of the price paid for the lands. A doubtful purchaser might be inclined to risk an inadequate price, in the hope that no reversioner might come forward to dispute the matter with him; but when the full value of thing is given, and where the purchase is made publicly and in the immediate neighbourhood of many members of the family who had all an interest in preventing improper alienations, it is only a fair presumption that the purchaser has made all such enquiry as was open to him, and has satisfied himself to the best of his power that there existed such a necessity as allowed a life-holding widow to alienate. The silence of the relatives alone would, I am inclined to think, be almost enough to protect an honest purchaser under such circumstances.

Now Gobindpoor Estate No. 1 was bought by Akbar Alee for Rs. 6,001. The proportion of rent fixed upon it, with reference to the whole Hoodah Belaspore, was Rs. 490 as appears from the Plaintiff's written statement; so that the price paid was more than 12 times the Sudder jumma; and that 50 years ago would have been a fully adequate price to pay for land.

Turif Jogye Estate No. 2 was sold to Atabar Hossein for Rs. 10,599. The Sudder jumma of this estate was Rs. 950, so that the price paid amounted to nearly 11 years purchase, and was undoubtedly a fair price for the property.

Moreover these sales were immediately after being effected duly registered, and mutation of names in the Collector's Register was made. They were made also, it must be remembered, whilst Sham Sonder the undoubted reversionary heir to Radha Govind after his widow Kunchumonee's death, was alive, and a resident of the same part of the country. This Sham Sonder being himself a shareholder in the Hooda by the purchase of Hurirampoore from Radha Govind.

After Sham Sonder's death, we find Apurno Monee his widow giving in a petition for a Butwara of the Hooda Belaspore, with the purchasers from Kanchanmonee. Of course it may be said, as in fact it has been said by Mr. Branson on the part of the

reversioners, that so long as Kanchanmonee lived neither Sham Soonder nor Apurnomonee had any particular interest in interfering but admitting that their legal rights would not have been jeopardised, it was I think most unlikely thing for them to have stood by to all appearance consenting parties whilst their family inheritances was being sold without valid necessity to strangers.

Then if we look to Benode Lall Rai's conduct it seems to favor the idea that the family considered 'kanchanmonees' alienation to have been justifiable. Benode Lall Rai lived for nine years after Kanchanmonee's death and consequently nine years after the succession to Radha Govind's estate opened out him and yet he took no steps to obtain his rights! His sons, the plaintiffs in this case, waited two whole years more, and then only came forward, so far as it appears in consequence of the Vakeel Dwarkanath Chuckerbutty's interference in the case. I confess that I look upon this man's petition of withdrawal with much suspicion, and feel tolerably certain that he is even now the moving spirit of this litigation. It is alleged of course that poverty has prevented the sons of Binode Lall Rai from pursuing their rights hitherto, but if Dwarkanath Chuckerbutty have really withdrawn from the suit, the plaintiffs now would be as incapable of carrying on this suit as they ever were. But there is no ground that I can see for any such profession of poverty. According to their own account, Kanchanmonee got from her husband property to the extent of Rs. 25,000. It is nowhere alleged that she made any other alienations than the ones now complained of. It is quite clear that when Kanchanmonee went to Brindaban she was very poor, for she had a subsistence allowance of Rs. 5 a month, and the family paid Rs. 7-8 for her funeral expenses. If she ever got Rs. 25,000 worth of property from Radha Govind, what has become of the balance? What moreover has become of Sham Soonder's and Apurnomonee's property? It is in evidence that they had property and that that property descended to Benode Lall Rai, from whom of course it went to the plaintiffs. The excuse of poverty therefore seems altogether unfounded. And the only reason for bringing this suit after so many years of silence and apparent acquiescence I should set down to the influence of the speculator, Dwarkanath Chuckerbutty.

Taking therefore all the circumstances into consideration, the length of time since the sales, which prevents the obtaining of any direct evidence, the full price given by the purchasers, the proved knowledge of the alienations at the time they were made by the then reversionary heir, the unexplained silence of Benode Lall Rai up to the day of his death, and the delay of bringing this suit by his sons, I am of opinion that the defendants are entitled to a presumption in their favor that their ancestors purchased the two estates in question after due enquiry and after in good faith satisfying themselves of the existence of necessity which would allow of Kanchanmonee's selling. The plaintiffs have given no evidence to rebut this presumption.

I think that the judgment of the Subordinate Judge should be reversed and the plaintiff's suit be dismissed with costs.

MR. JUSTICE KEMP.—I concur in reversing the decision of the Subordinate Judge. The main points are:—

1st.—Is the suit barred.

2nd.—The question of the adoption of Benode Lall Rai, the father of the plaintiffs.

3rd.—Are the alienations by Kanchanmonee, the widow of Radha Govind, valid under the Hindoo law.

On the first point I entirely concur with Mr. Justice Glover, and have nothing to add.

On the second point, it seems to me clear that the factum of the adoption of Benode Lall was not seriously questioned in the Lower Court. The pleader for the defendants was asked about the adoption. His answer was as follows, I translate literally, "Binodher Lall is not the *son* begotten of the loins of Sham Soonder, he is the adopted son but the ceremonies *were* not performed in compliance with the Shasters." Again in the written statement of the defendants I find it stated "Binodher is not the son of Sham Soonder."

The factum of the adoption being admitted or at all events not questioned in the Lower Court, it rested with the defendants particularly taking into consideration that the status of Benodhee Lall as the adopted son of Sham Soonder was recognised by the family for many years, to prove that the ceremonies necessary to render that adoption valid were omitted or not performed. The

defendants have in my opinion wholly failed to prove this.

On the third point, which was more laboured than any other point in the argument before us, I concur with Mr. Justice Glover. It is not fair to expect from the defendants, after fifty years have elapsed from the date of the alienations, proof that the original alienees satisfied themselves that there was legal necessity for the sales by the widow Kunchanmonee. The recitals in the deed would not in my opinion be evidence of such necessity if we were deciding as between the reversioners and the original alienee within a reasonable period after the death of the widow. In such case the alienee would be in a position to prove that he satisfied himself of such necessity, nor are such recitals in my opinion conclusive evidence even in this exceptional case where we are dealing with the descendants or vendees of the original alienees after a lapse of half a century; but in a case where we find a recital in deeds 50 years old and which were duly registered and published of the existence of a legal necessity for the alienations, where we find that the consideration paid was a fully adequate one, and lastly where we find that the conduct and silence of Benodee Lall for nine years after the death of Kunchanmonee when the succession opened out to him as heir of Radha-Govind have been such as to raise a strong presumption which has not been rebutted that those recitals were true and bona fide, we should be wrong in disturbing the long possession of the defendants and their predecessors which has continued without dispute for half a century.

March 6th, 1872.

### High Court, N. W. Provinces.

3RD JUNE, 1871.

*Present:*

HON. MORGAN, *Chief Justice.*

„ SPANKIE, *Judge.*

*Special Appeal No: 561 of 1871.*

Juggun Nath and another, ... *Appellants,*

Komal Singh, ... *Respondent.*

The fact that property is sold under a decree obtained by a plaintiff in respect of a debt due to him does not of itself prevent such plaintiff from

insisting upon the lien to which he is entitled under a prior hypothecation to him, for another debt of the same property.

A decree obtained under the summary procedure prescribed by the Registration Act can be for money only, and not for the enforcement of a lien.

THIS was a special appeal against the decree of Moulvie Mahomed Hassan Khan, Subordinate Judge of Shahjehanpore, dated 22nd February, 1871.

In this suit, the plaintiff had sued to have certain property hypothecated to him brought to sale in satisfaction of his lien thereon under the hypothecation, and defendants contended that the property in suit, having been already sold at auction under a money-decree in favour of plaintiff, and at which sale he had given no notice of same having been hypothecated to him for a prior debt, could not now have same sold as claimed. The Court of First Instance dismissed the suit, and the Lower Appellate Court reversed that decree; whereupon the present appeal was presented.

The plaintiff's prior hypothecation clearly entitles him to obtain satisfaction out of the property which the defendant has purchased at a sale in execution of a decree, and the fact that such decree was one obtained by the plaintiff himself in respect of another debt does not of itself prevent the plaintiff from insisting on this prior right.

If, indeed, upon the sale in execution of the decree the plaintiff had so conducted himself in respect of this prior right as to deceive purchasers, the case would have been different. In the present case we think, upon consideration, that no foundation has been laid for further inquiry as to the sale and the conduct of the plaintiff in effecting it.

But, admitting this, some difficulty arises from the mode in which the plaintiff has now sued. He refers to the decree obtained by him under the summary procedure of the Registration Act, and to the objection made to its execution, rather than to the mortgage-bond itself, as the basis of the suit. Now, the decree was and could only be a decree for the money, and not for the enforcement of the lien. Under it, therefore, he could not assert any preferable right to the purchaser's.

Some expressions in the plaint do, no doubt, refer to the plaintiff's right as arising from the hypothecation-bond itself, and in the Appellate Court an issue was framed as

to the bond; and, adverting to these, we think we may be justified in regarding this suit as sufficiently asserting the original right of the plaintiff, and not merely that arising from the present decree. In this view the plaintiff is entitled to a decree. The appeal is dismissed with costs.

## High Court of Bombay.

REGULAR APPEAL

No. 55 of 1870.

*Present:*

HON'BLE MELVILL,

„ KEMBALL,

31st August, 1871.

Keshavrav Krishna Joshi ..... *Appellant,*

*versus*

Bhavanji Bin Babaji..... *Respondent.*

*Mortgage—Power of Sale—Right of Mortgagee to sell without intervention of Court—Costs—Discretion—Appeal.*

As a general rule an appeal in respect of costs will only be entertained in cases in which no discretion has been fairly exercised upon the question, and the decision of the Court below has proceeded upon mistake or misapprehension.

Where *bond fide* care and discretion have been exercised, no appeal in respect of costs should be allowed, and the question whether such discretion has been well or ill exercised should not be entertained.

*Semlé* (per Melvill, J.) that a private sale effected by a mortgagee in the *Mofussil* without the intervention of a Court, in pursuance of a power of sale given to him under his instrument of mortgage, is invalid.

This was an appeal from the decision of Krishnarav Vithal Vinchurkar, Subordinate Judge, First Class, at Sátará.

The facts fully appear from the following judgment:—

MELVILL, J.:—The defendant borrowed from the plaintiff Rs. 644-11-3, bearing interest at six per cent., and executed a deed of Mortgage by which he conveyed a house to the plaintiff, and covenanted that in default of payment of principal and interest within four months, the plaintiff might sell the house without notice to the defendant, and apply the proceeds to the liquidation of the debt; any balance which might remain due being recoverable from the defendant with compound interest. The plaintiff

was also to account to the defendant for the rents and profits of the house.

The plaintiff has come into court asking for a decree for the principal and interest, and for an order for the sale of the house. This decree and order have been made, but the Subordinate Judge has laid all the costs of the suit on the plaintiff, on the ground that the mortgage-deed gave him a power of sale, and it was, therefore, unnecessary for him to come into court until he had exercised that power, and found it insufficient for the purpose of recovering the full amount of the debt.

The plaintiff appeals against the order as to costs, and also against the refusal of the Subordinate Judge to award interest during the pendency of the suit. The defendant has filed an objection under Sec. 348 of the Code, on the ground that, under the terms of the mortgage-deed, he is not liable for interest after the expiration of four months from the date of the deed.

We are always unwilling to admit an appeal on the question of costs. I think that we should adhere to the principle laid down by the Privy Council in *Atterborough v. Kemp* (a), namely, that an appeal in respect of costs should only be entertained in cases in which no discretion has been fairly exercised upon the question, and the decision of the court below has proceeded upon mistake or misapprehension, and that where *bond fide* care and discretion have been exercised, no appeal in respect of costs should be allowed, and the question whether such discretion has been well or ill exercised should not be entertained. But, while accepting this as the general rule, I consider that we shall not be contravening it, if in the present case we allow the property of the Subordinate Judge's order as to costs to be called into question. To lay the whole of the costs of a suit on the winning party is an extreme measure, which is only justifiable in cases in which a suit may have been wholly unnecessary for the purpose of establishing and enforcing the plaintiff's right. If the plaintiff can show that such an order was made under a mistake or misapprehension of the law, and that the filing of a suit was a necessary proceeding, or, if not absolutely necessary, that it was a reasonable and discreet proceeding, then he is fairly entitled to ask an appellate court to set aside such order.

# THE HIGH COURT CIRCULARS.

## Circular Orders by the High Court of Judicature at Fort William in Bengal.

No. 9.

All Civil Authorities, Lower Provinces,—  
dated Calcutta the 8th March 1872.

THE following general rules made by the High Court of Judicature at Fort William in Bengal, in the exercise of the powers vested in it by section 15 of the Charter Act 24 and 25, Vic. cap. 104, and with the sanction of the Governor General of India in Council, in respect of the receipt and payment of money deposits, are now promulgated for observance by all subordinate Courts in the Lower Provinces.

By order of the High Court,

F. B. PEACOCK,

Registrar.

*Rules for the guidance of all Courts subordinate to the High Court in the receipt and payment of money.*

1. Judges, Magistrates, Moonsiffs, and Small Cause Court Judges, do not submit accounts to the Accountant-General. They should, as far as possible, in their cash transactions with the public, merely authorize the receipt and payment of money at the Government Treasury. Where inconvenience would result from this rule, money may be received and receipt granted by such Officers. Money thus received may be paid out on the day of receipt to the person entitled to receive it, but all sums remaining on hand when the Court or office is closed for the day must be remitted to the Treasury the same day (or, if that is not possible, on the following morning), and must not, under any circumstances, be retained for disbursement. The only money which may be retained by the above Officers is that drawn from the Treasury as a permanent advance. Whenever a Judicial

Officer repays deposits out of sums received by him in the day, and not paid into the Treasury, he shall, in his daily accounts, debit the full amount repaid and send the receipted payment orders in verification of the balance of receipts not remitted in cash.

2. The following records must be kept by the above Officers :—

1. Cash Book.
2. Register of chalans issued.
3. " of payment order issued.
4. " of deposit receipts.
5. " of deposit repayments.
6. " of fines and forfeitures.
7. " of Ameens's Fees Fund.
8. " of Sheriff's fees (Local funds)
9. " of Registration fees.
10. " of Stamp fines and penalties
11. " of Intestate property.

12. Miscellaneous Register.

3. The Cash Book (Form 3) will exhibit all sums received from and paid to the public in actual cash. It will also show, in a separate column, cash received from the Treasury as a permanent advance or in reimbursement of sums expended from a permanent advance. All remittances to the Treasury will also appear in it. It will be closed and balanced each day, and signed daily by the presiding Officer after careful examination.

4. When a person desires to pay money into any Court, or when money is paid in by any

Receipts. Officer of the Court, he shall be furnished with a chalan in duplicate, prepared by the proper Officer and signed by the Sorishtadar of the Court. The form of biglot chalan annexed (No. 4) is to be

\* The forms are, with some modifications, those now in use. The Accountant-General will issue them. used.\* The particulars prescribed in the form must be carefully filled in. The chalan must be entered and numbered in the Register of chalans issued (Form No. 4) in a consecutive series of numbers.

5. The following are the Heads of Account in the Treasury Book for which separate chalans should be prepared :—



1. Judicial deposits.
2. Fines and forfeitures.
3. Ameen's fees.
4. Sheriff's fees (Local Funds).
5. Registration fees.
6. Stamp fines and penalties.
7. Property of Intestate.
8. Miscellaneous receipts (net deposits),  
i.e., proceeds of sale of torn records, old furniture, examination fees, &c.

6. On presentation of the chalan at the Treasury and on receipt of the money, a form of acknowledgment prepared by the payer shall, if demanded, be signed by the Officer in charge or by the Accountant (according to rule).

7. When this course would entail inconvenience to the person tendering money, the Court may receive it direct and grant a receipt for the same. The entry in the Cash Book should be initialled by the Judge at the time the receipt is granted.

8. At the close of business of each day, or on the following morning, chalans so received shall be sent to the Treasury with the balance of cash and Pass Book in Form No. 15 (modified). The chalans for money received into Court and repaid during the day will be excluded.

The Treasury Officer will check the entries in the Pass Book with the chalans and orders for payment, and return the book receipted.

9. Payments of money must be made on vouchers in Form No. 2, which will be delivered to claimants by the Judge or other Officer with the particulars in the form duly filled in. The order for payment must be entered and numbered prior to issue in the Register of payment orders issued (Form No. 6).

10. If the cash in hand suffices, the Court may at once pay the money on the responsibility of the presiding Officer, and in such cases will forward, at the end of the day to the Treasury, payment orders for the amount duly receipted by the payees. In all other cases, the payment must be made to the payee at the Treasury.

11. The total of chalans of the day for money received by the Court, minus the total of orders for payment cashed at the Court, will represent the balance of cash to be remitted to the Treasury.

12. This Register must be kept in Form No. 4. All chalans authorizing the payment money into the Government Treasury by individuals or officers of Court, or with which money is received in Court and forwarded to the Treasury by the presiding Officer, must be entered in the Register, and numbered in annual consecutive series, such details being added in the column of particulars against each amount as may be necessary for identifying it and writing up therefrom the several Registers.

13. At the close of business of each day, the Treasury Officer, whether Sudder or Sub-divisional, will prepare a list in Form No. 5 of all the chalans of each Court or office that have been presented at the Treasury in the course of the day. In the case of the Sudder Treasury, the list will include all chalans received from Sub-divisional Treasuries on that day, but these will not be checked or the particulars brought on the District Registers till the end of the month. On receipt of this list by the Officer concerned, the particulars of the chalans shown in it should be compared with the details recorded in the Register of chalans, and the date of actual credit, as certified by the Treasury Officer, should be entered in the column prescribed for that purpose. Where the money has been repaid on the day of receipt, the entry in this column will be left blank, a note to that effect being made in the column of remarks at the time of repayment.

14. The Office Register of deposit receipts, Form No. 7, should next be written up in prescribed detail from the particulars recorded in the Register of chalans. In this Register there will thus only be shown the amount of the chalans of deposits which are reported in the Treasury Officer's list to have been actually presented at the Treasury.

15. All items of deposit in this Register must be numbered in an annual consecutive series of numbers, commencing on 1st April and continuing to 31st March of each official year. Every entry in the Register must be initialled by the presiding Officer of the Court or Office after comparison with the Treasury Officer's list and the Register of chalans; only the first eight columns should be filled in at first, other column being intended for the record of subsequent repayments.

16. On the 27th or last open day of the Treasury, an Extract Register of deposits (Form No. 9) will be forwarded to the Judge or other District Officer by the Moonsiff or other Subordinate Officer, which will contain those items only which were deposited during the month and remained unpaid on the above date. These items only will be brought upon the District Registers for the month and numbered in continuation of the district series; the district numbers being noted for reference on the Extract Registers of the Subordinate Officer. At the foot of this Extract Register, deposits received and repaid during the month by the Subordinate Officer will be shown in a lump sum without details.

17. At the end of each month, an Extract Register of deposits must be prepared by the Judge or other District Officer in the same form (No. 9) and forwarded to the Treasury Officer for submission with his cash account to the Accountant-General. This Extract Register will contain those items only which were deposited during the month and remained unpaid on the last day of the month. At the foot of this Register, deposits received and repaid during the month will be shown in a lump sum without details. This Extract Register should be despatched punctually at the end of the month.

18. At the same time a plus and minus memo., showing the total amount of deposits received and repaid during the month, with the balances on the first and last day of the month, should be prepared and entered at foot of the Extract Register of deposit receipts in the following form:—

	Rs.	As.	P.
Balance of last month	0	0	0
Deposits as above	0	0	0
„ received and repaid during the month in (lump)	0	0	0
„ repaid	0	0	0
Balance	0	0	0

19. The rules laid down in paragraphs 14, 15, 16, and 17, should also be observed in the case of the other Registers referred to in paragraph 12. The monthly Extract Register

of fines realized and paid into the Treasury should be in Form No. 13. Fines are under no circumstances to be held in deposit, but should be paid into the Treasury to credit of Government. Refunds of fines will be made by the Treasury Officer on production of an order prepared in Form No. 14, and passed for payment by the presiding Officer of the Court. Remission of fines should be noted in the Register of fines.

20. All orders for the payment of money must be entered prior to issue in a Register (Form No. 6) and numbered in an annual consecutive series of numbers; such details being recorded as are necessary for writing up the several Registers.

21. In authorizing the payment of any sum, the local Officer is required to satisfy himself in the first instance of the validity of the claim, and, in the case of deposits, to ascertain from his Register of deposits whether the balance at credit of the particular deposits is sufficient to meet the repayment, and that there has been no order for the attachment of the money. If the claim is good, he should issue an order for the payment of the amount either from the local Treasury or from his Court, as prescribed above, and, in case of deposits if the balance is sufficient, at once record the order of refund, in anticipation of the actual payment, against the particular number in the Register of deposits, attesting the entry with his initials. Should the payment be ordered to be made from Court on the day of receipt of the money, the Judge or other Officer should, at the time of issue, enter the date of payment in the proper column, noting the fact in the column of remarks.

22. As in the case of chalans, the Officer in charge of the Treasury, whether Sudder or Sub-divisional, will enter in the daily advice list (Form No. 5, to be forwarded to each Court or Office) all the orders of payment of such Court or Office that have been cashed at the Treasury in the course of the day, and forward the same to the Officer concerned. In the case of a Sudder Treasury, this list will include all orders of payment received from Sub-divisional Treasuries on that day.

23. On receipt of the list by the Officer concerned, it should be carefully compared, item by item, with the Register of payment orders, and the date of actual dis-



charge should be noted in the Register in the proper column against every number included in the list. The Register of deposit repayments and other Office Registers should be written up from this list.

24. This Register (Form No. 12) should contain the details of all deposits actually disbursed from the Treasury, and should be written up daily from the Treasury Officer's list of payments after check with the Register of orders of payment. Deposits of previous months repaid at Sub-divisional Treasuries should be recorded in the Judge's Register of deposits as well as in the Register of deposit repayments. Deposits of the current month repaid during the month at Sub-divisional Treasuries should not be recorded by the Judge in either Register, but should be shown in lump in his Extract Register of deposit repayments.

25. On the 10th and 27th (or last open day of the Treasury) an Extract Register of deposit repayments (Form No. 12) will be forwarded to the Judge or other District Officer by the Moonsiff or other Subordinate Officer, which will contain the repayments of previous month's deposits only. At the foot of this Extract Register repayments of deposits of the current month will be shown in a lump sum without details.

26. A bi-monthly extract from his Register of deposit repayments should be forwarded in the same form by the Judge or District Officer to the Treasury Officer for submission with his lists of payments to the Accountant-General on the 10th and last day of each month, respectively. The first extract should show the repayments made from the Treasury (both Sudder and Sub-divisional) between the 1st and 10th; and the second, those made between the 11th and the last day of the month. All repayments of the current month's deposits, whether made at the Sudder or Sub-divisional Treasury, should be shown in lump sum without details. These Extracts should be despatched punctually on the above dates.

27. Small Cause Court Judges, Moonsiffs, and other Officers, who hold their Courts at places other than the Sudder Station, or the head quarters of a Sub-division, will be guided by the above rules, making periodical, instead of daily, remittances to the nearest

Treasury, whether Sudder or Sub-divisional. Every such remittance should be accompanied by the channals and payment orders, together with the Pass Book in Form No. 15 (modified), full particulars being entered therein for the guidance of the Treasury Officer, who will return the Pass Book receipted.

The maximum cash in the hands of Small Cause Court Judges should never exceed Rs. 500, or of Moonsiffs Rs. 500.

28. On the last day of each official year all deposits of more than three years' standing should be written off in the Register of deposit receipts, in which a note should be made against the numbers to the effect that they have been credited to Government, and are thus no longer available for refund under the orders of the local Officer. The same course should be followed in regard to deposits or unpaid balances of deposits not exceeding one rupee in amount which have been unclaimed for more than twelve months. A list should be prepared in Form No. 10 of amounts thus written off, and forwarded to the Accountant-General.

29. When the refund of deposit thus written off is required by a depositor, the local Officer should forward an application to the Accountant-General in Form No. 11, a separate form being used for each application. The Accountant-General's letter of authority when received should be noted against the items in the Register of deposit receipts to obviate a second application, and then passed for payment at the Treasury, as prescribed in the form. No other record need be kept of these refunds.

30. At the close of the first month of the next official year, the amount of unclaimed deposits written off the Registers should be deducted from the balance of deposits in the plus and minus memo.

31. During the absence on tour of Sub-divisional Officers and the consequent closing of their Treasuries, Moonsiffs must be guided by the rules for Officers at stations where there are no Treasuries making remittances of surplus cash, if necessary, to the District Treasury. They should take advantage of the periodical returns of Sub-divisional Officers to head-quarters to reduce the cash balances in their hands as much as possible, having due regard to their probable requirements.

## No. 10.

*All Civil Courts, Lower and Extra Regulation Provinces,—(dated Calcutta, the 28th March 1872.)*

AT the request of the Lieutenant-Governor of Bengal, the following instructions are issued for the guidance of all Judicial Officers, subject to the control of the High Court, in respect to the distribution, between Government and the parties to suits, of the postage charge incurred in certain cases.

2. When records are called for by Civil Courts at the instance of parties, the party applying should pay the charge for postage; but when the Court calls for them of its own motion, then the postage should be in the first instance paid by the State, but the Court may in its discretion make such postage a part of the costs and order the losing or other party to pay. Such records do not in the first-mentioned case stand in the position of the records alluded to in the letter from the Government of India in the Financial Department, No. 3118 dated 21st November 1870,\* ruling that "the charge for transmitting records through the post from one Court to another should be borne by the State."

3. When copies of notifications of sales, &c., are sent by Courts in the interior for the purpose of being affixed in the Office of the Collector and in the Court of the Judge, and when the replies thereto are sent by the general post, the postage should be paid by the party applying for sale and chargeable as costs of execution.

4. In like manner, when Civil Courts in the interior of the district, upon applications of decreeholders, ask for attachment of the judgment debtors' interests in decrees or documents deposited in other Courts, the postage for the despatch of the requisition, and for the return of the reply, should be borne by the party applying.

5. As regards notices to respondents in appeal cases, the postage should be paid by Government; there being in contemplation one uniform rate of *tulubana* fee, and the transmission by post for part of the distance being an economy to the Government.

6. When Courts in the interior make requisitions upon the District Court at the Sudder Station for the payment of money in deposit to decree holders or other persons, the postage for such requisitions should be paid by the parties on whose behalf they are made.

By Order of the High Court,  
F. B. PEACOCK,  
Registrar.

## No. 11.

*To all District Judges and Judicial Commissioners,—(dated Calcutta, the 28th March 1872.)*

Several instances having recently occurred of mistakes on the part of Civil and Sessions Judges, in respect to the declaration required from them previous to their assumption of office, the Court desires to point out that, under the law as it at present stands, the only form of solemn declaration required to be made and subscribed by a District Judge is that prescribed in Section 13 of the Bengal Civil Court's Act (VI of 1871). No further oath or declaration is warranted by law in respect of the office of District Judge, and no oath at all is now required to be taken by Judges of the Court of Session.

2. Where the District Judge's predecessor in office leaves the station before the Judge's arrival, such declaration must be made before the Magistrate of the District, but not before a Joint Magistrate or other officer in charge who has no authority to receive and attest such declaration "for the Magistrate."

By order of the High Court,  
F. B. PEACOCK,  
Registrar.

## No. 12.

*To all District Judges and Judicial Commissioners,—(dated Calcutta, the 8th April 1872.)*

The Court request that quarterly returns may be made by each District Judge and Judicial Commissioner of the receipts and disbursements on account of Civil Court Amiens and other Commissioners' appoint-

HIGH COURT, &c.  
CIVIL SIDE.  
Present :  
The Hon'ble Sir R. Couch, Kt.,  
Chief Justice.  
The Hon'ble G. Loch.

\* Vide Circular Order No. 1, dated 4th January 1871.

The Hon'ble Louis S. Jackson. The Hon'ble A. G. Macpherson. The Hon'ble F. A. Glover. Judges of the Court.

ed under Sections 180 and 181, Act VIII of 1859, in connexion with his own Court and the Courts subordinate thereto. The returns should include all money received and credited and all payments made on account of Ameens' fees or remuneration of Commissioners whatever appointed under Act XII of 1856, or temporarily employed, but should not include boat-hire or other travelling expenses\* which are payable to the Officer direct.

2. The return should be made in the form appended, and should begin with the 1st April 1872, the commencement of the

ensuing financial year. The first return will therefore be due on or before the 15th July next.

3. At the foot of the statement, and after the total of the expenditure on account of salaries, an addition should be made of 10 per cent. on account of pensions, as expressly desired by the Government of India.

4. The Court will expect these returns to be carefully prepared and promptly submitted. A similar monthly return will be furnished by the Accountant-General, with which the local returns now prescribed will be checked.

By order of the High Court,

F. B. PEACOCK,

Registrar.

*Statement showing receipts and disbursements on account of the employment of Ameens in the district of during the month of 18 .*

NAME OF COURT.	Receipts on account of employment of Ameens permanently entertained.	Disbursements on account of employment of Ameens permanently entertained.	Receipts on account of Ameens temporarily employed.	Disbursement on account of Ameens temporarily employed.	Amount received as fees paid for the employment of Moonsiffs as Commissioners.	Ameens permanently employed 1st, and 2nd Grades.	REMARKS.

No. 14.

*To all Civil Judges - (dated Calcutta, the 9th April 1872.)*

Rule 8 of the Rules made by the High

HIGH COURT, &c.  
CIVIL SIDE.

Present :

The Hon. Sir H. Couch, Kt.,  
Chief Justice.

The Hon. G. Loch

H. V. Bayley,

F. B. Kemp,

Louis S. Jackson,

J. B. Phear,

A. G. Macpherson,

F. A. Glover,

D. N. Mitter,

W. A. Mallett,

Judges of the Court.

Court under Section 37 of Act XX of 1865, and notified by Circular Order No. 22, dated 13th June 1866, is hereby rescinded, and the following Rule is circulated for general observance :—

AMENDED RULE VIII.

"The amount in respect of the fee of an adversary's pleader when allowed in any

miscellaneous proceeding, or for any other matter than that of appearing, acting, or pleading in a suit prior to decree, shall be fixed by the Court according to the following scale viz :—

"A fee not exceeding Rs. 80 in the Court of a Judge or Subordinate Judge.

"A fee not exceeding Rs. 16 in the Court of a Moonsiff in suits of amount or value exceeding Rs. 300.

"A fee not exceeding Rs. 4 in the Court of a Moonsiff in suits of amount or value not exceeding Rs. 300.

"Circular Order No. 28, dated 20th July 1866, is also rescinded."

By order of the High Court,

F. B. PEACOCK,

Registrar.

## No. 15.

*To all Civil Authorities,—(dated Calcutta the 13th April 1872.)*

The Court are pleased to direct that when-

HIGH COURT, &c.  
CIVIL SIDE.

Present:

The Hon. Sir R. Couch, Kt.,  
Chief Justice.

The Hon. G. Loch,  
" Louis M. Jackson,  
" A. G. Macpherson,  
" F. A. Glover.  
Judges of the Court.

ever Moonsiffs are employed as Commissioners under Sections 180 and 181 of the Code of Civil Procedure, the parties to the suit shall be charged at the rate of 10 rupees

for each day the investigation lasts. All sums so received are to be credited to Government and shown in column 6 of the Statement appended to Circular Order No. 12, dated 8th April 1872. Moonsiffs so employed will also be entitled to their travelling expenses either by land or water, which must be calculated and paid in the manner prescribed in paragraph 3 of Circular Order No. 30 of 10th October 1863.

2. It is not to be understood that the Court contemplate the frequent employment of Moonsiffs as Commissioners or otherwise than under the special orders of the District Judge; such work will, as heretofore, be usually performed by Ameens. Occasions may, however, sometimes arise when by reason of the amount of work already in the hands of the Ameens of a District, or the importance of a particular investigation, the employment of a Moonsiff in this way may be thought desirable by the District Judge, and it is to meet such cases that the present Circular Order is issued.

By order of the High Court,

F. B. PEACOCK,  
Registrar.

## No. 16.

*To Judges of Small Cause Courts,—(dated Calcutta, the 25th April 1872.)*

In continuation of Circular Order No. 5,

HIGH COURT, &c.,  
CIVIL SIDE.

Present:

The Hon. Louis S. Jackson,  
One of the Judges  
of the Court.

dated 25th February 1871, the following instructions communicated to a Judge of a Small Cause Court, are forwarded for the information and guidance of Judges of Small Cause Courts.

By order of the High Court,

F. B. PEACOCK,  
Registrar.

## No. 814.

*From F. B. PEACOCK, ESQ., Registrar of the High Court of Judicature at Fort William in Bengal, to the Judge of Small Cause Court, Patna,—(dated Calcutta, the 22nd March 1872.)*

Having laid before the Court your letter

HIGH COURT, &c.  
CIVIL SIDE.

Present:

The Hon. Louis S. Jackson,  
One of the Judges  
of the Court.

No. 11 of the 23rd ultimo, soliciting to be informed whether a column "Total value of suits," as in the

Consolidated Statement No. 7 B for the District Courts, prescribed by Circular Order No. 32, dated 8th November 1870, should not be added to the Judicial Statement No. 7 for the Small Cause Courts, prescribed by Circular Order No. 5, dated 25th February 1871, I am directed to observe as follows:—

2. The Small Cause Court Statement No. 7 was ordered by Circular Order No. 5, dated 25th February 1871, so as to enable the Small Cause Court Judges to furnish the District Judge with the necessary materials (as to their Courts) for constructing the General Statement No. 7. Column 7 of the latter was certainly intended to show the total value of suits of each denomination in the district; and to enable the District Judge to arrive at such general total, each Court should furnish its own total, and the Small Cause Court Statement No. 7 should therefore have such a column. The Superintendent of Stationery will be so instructed, in order that the necessary addition may be made to this form when the present stock is exhausted; in the meantime the column of remarks may be subdivided, the first half being headed "Total value of suits."

## CIRCULAR MEMO. No. 7.

*To \*all District Judges and Subordinate Judges,—(dated Calcutta, the 9th April 1872.)*

In connection with Circular Memo. No. 5

HIGH COURT, &c.,  
CIVIL SIDE.

Present:

The Hon. Sir R. Couch, Kt.,  
Chief Justice.

The Hon. G. Loch,  
" Louis M. Jackson,  
" A. G. Macpherson,  
" F. A. Glover.  
Judges of the Court.

of the 11th September 1871, calling for a report as to the period within, and the intervals at which it will be practicable to require the transmission of Moonsiffs' and Subordinate Judges' records at out-stations to the several Appellate Courts, the following

suggestions made by the Judge of Bhaugul pore on the subject are circulated, with a request that the High Court may be favored as early as possible, with the opinion of District Judges thereon :—

"Every party appointing a pleader or filing an appeal or for other purposes can obtain, on payment of a sum of Rs. 5 only in appeals from orders of Subordinate Judge, and Rs. 2 in appeals in rent suits, &c., from orders of Moonsiffs, copies of all the papers in this Court comprising the record of the case, by putting in an application on a slip of plain paper. The copies are prepared by English and Vernacular copyists appointed under Circular Order No. 18 of the 23rd June 1870.

"This rule is largely availed of by the parties, and the pleaders are in every instance supplied with a complete vernacular brief of all the papers of the case, and the party is saved all the bother and trouble of constant attendance on his pleader. I have found the rule work so well that I can confidently recommend its adoption in the Lower Courts with slight modifications. Probably in a very short time the people will become aware of the facility thus afforded them, and largely avail themselves of it. The introduction of the rule will do away with the necessity of having the records earlier at the Judge's Court. For instance, a party cast at the Lower Court, on putting in an application for a brief for his case, can obtain unauthenticated copies of its record in a short space of time at the Court, and can come with only an authenticated copy of his decree to the Appellate Court. The copies of records being supplied to pleaders, the rule in Circular Order No. 17 of 23rd May could virtually be thus carried out. This will obviate the necessity of an earlier transmission of records. The records of the case are on an average so unvoluminous, that Rs. 2 for a copy of brief in each case will be ample, and men will be found to grant these copies on an average of two days' time, their remuneration being debited to the accumulation of the fees, which will not be very small."

No. 8.

To all District Judges and Judicial Commissioners of Assam and Chota Nagpore,—  
(dated Calcutta, the 23rd April 1872.)

District Judges and Officers holding the

HIGH COURT &c., like powers are requested to furnish this Office with complete lists, in the form here-  
The Hon. Louis S. Jackson, One of the Judges of the Court.

to appended, of all the Pleaders and Mooktears enrolled under the High Court's Rules of 2nd May 1866, before the 1st April 1872, with the date of enrolment of each and the other particulars for which the form provides.

2. It will be seen that one form only is considered necessary; but there must be three distinct returns in the same form, *viz.*, one for Pleaders of the senior grade, another for Pleaders of the junior grade, and a third for Mooktears. The headings of the form, it is believed, explain themselves sufficiently, with the exception of heading to column 5, "Nature of qualification and date of original admission," which should be understood as providing for the following information: In the case of Pleaders, it should show whether they were admitted after examination, or, as possessed of a Law degree, under the general operation of the Rules of 2nd May 1866, or as old Pleaders, under the special proviso in Rule 5. Similarly, in the case of Mooktears, it should indicate whether they were admitted after examination under the general rules applicable to such practitioners, or under the specific permission in Rule 39. The date of original admission will of course be the date on which the Pleaders and Mooktears of the exceptional classes just described were admitted to practice before Act XX of 1865 came into operation.

3. Blank printed forms of each description, and uniform in size and shape, are sent with this Circular, for the purpose of being filled up and returned as carefully and as speedily as possible, with a view to being bound up and preserved as an original and permanent record of the High Court.

By order of the High Court,

F. B. PEACOCK, Registrar.

Name.	Father's Name.	Age.	Place of residence.	Nature of qualification and date of original admission.	Date of admission and enrolment.	Date of District Judge's certificate.	Date of latest renewal.	REMARKS.

## MISCELLANEOUS.

*In the High Court of Judicature at  
Fort William in Bengal.*

### PETITIONS.

TO THE HON'BLE SIR RICHARD COUCH, KT,  
*Chief Justice, and his Companion Justices  
of the said High Court.*

The humble Memorial of the undersigned, Vakeels of the said Court,

RESPECTFULLY SHEWETH,—

THAT your Memorialists have read the Resolutions of this Honorable Court relating to the admission of Attorneys and Vakeels to the effect following, to wit:—

*First* ; that any person who is an Attorney of the High Court may be admitted as a Vakeel upon satisfying the Court that he is a fit and proper person to be so admitted.

*Secondly* ; that any Vakeel of the High Court may be admitted and enrolled as an Attorney after having served under articles of clerkship and been examined and duly certified to be fit and capable to act as an Attorney, and after having complied with the rules from time to time in force for admission and enrolment of Attorneys of High Court: Provided that no Vakeel shall during his service under articles of clerkship practise as a Vakeel.

That having given their best attention and most careful consideration to the Resolutions aforesaid, your Memorialists deem it their duty respectfully to represent that the said Resolutions are calculated to prove highly injurious to your Memorialists as a class, and, to considerably lower their position and status.

That the position which your Memorialists have hitherto occupied has been one intermediate between the Advocates of the High Court and the Attorneys. The Act of Parliament (24 and 25 Victoria, Ch. 104) and the

two successive Letters Patent establishing the High Court have uniformly recognized your Memorialists as a class superior to that of the Attorneys. In the Charter Act it is provided by Section 2 that Barristers of five years standing, Principal Studder Amceens, and Small Cause Court Judges of five years standing, members of the Covenanted Civil Service of ten years standing, and pleaders of the High Court of ten years standing, may be appointed Judges of the said Court. The Attorneys are not mentioned, and no Attorney, however long his standing may be, is eligible to become a Judge of the High Court. This, in the humble opinion of your Memorialists, is a clear indication of the intention of Parliament that the Attorneys as such shall not be of the same rank with the Pleaders of the High Court.

The provisions made in the Letters Patent are equally clear. The rank assigned to the Vakeels in the Charter of 1862, Sections 7, 8, 9, and 10, and the corresponding Sections 9 and 10, is next to the Advocate's.

This has likewise been judicially decided. In 1869 a question arising as to the right of pre-audience between a Barrister and a Vakeel of this Court, it was held by Mr. Justice Phear (10 Sevestre, page 43) that a Vakeel ranked next to a Barrister but above an Attorney; and in this opinion Peacock, C. J., concurred, while Mr. Justice Bayley, one of the Judges forming the Bench, was of opinion that the question of priority depended upon their respective standing.

That the duties required to be performed by the Vakeels and the Attorneys respectively are also clearly indicative of a distinction in favor of the Vakeels. By the Charter of 1862, a Vakeel was empowered to appear, act, and plead, and an Attorney only to appear and act. The Letters Patent of 1865 have indeed made a modification in this respect, but that modification has been with reference to all the three classes of practitioners—Advocates, Vakeels, and Attorneys—any one of whom may be authorized under Sections 9 and 10 by the Court to appear,

act, and plead on behalf of the suitors. But the Court introduced no change by the rules of practice, dated the 4th April 1866; it practically kept up the same distinctions and maintained the same rights and privileges of the respective classes.

It is clear, your Memorialists submit, from all this that the intention of Parliament and the framers of the Letters Patent, as well as the endeavour of the Court hitherto has been to create, if not to continue and cherish, under the appellation of Vakeels or Pleaders of the High Court, a thoroughly educated and efficient body of local practitioners, who shall be next only to the Barristers in rank and position. Whether, or how far this object has been carried out successfully is not a matter for present consideration, and it would ill become your Memorialists to discuss it in this place. But of this your Memorialists are painfully convinced that the resolutions in question are not the right means of accomplishing that object. On the contrary, your Memorialists are humbly of opinion that they are calculated to lower the position of the class to which your Memorialists belong in the estimation of the public. Your Memorialists, therefore, cannot help representing, with the deepest sorrow, that by these Resolutions a great and unnecessary injury has been done to their body.

That your Memorialists have not failed to observe that the first Resolution does not allow an Attorney as such to become a Vakeel of the High Court; but they regret to find that a similar provision has not been made in the second Resolution as regards the admission of Vakeels as Attorneys. An Attorney, as such, may, by the Resolutions, be admitted as a Vakeel, provided only he satisfies the Court of his fitness—the standard of fitness being absolutely in the discretion of the Court; while a Vakeel, although his standing may be of ten, fifteen, or twenty years, and with whatever eminence he may have practised, will have to duly serve out his apprenticeship and to undergo a regular and formal examination before he can be admitted as an Attorney.

That in thus taking exception to the Resolutions in question, your Memorialists have not omitted to consider the possible claims which may be urged on behalf of the

Attorneys, as will appear from the observations which are respectfully submitted herein below:—

*First*; as regards the propriety of the first Resolution it may be said,—(1) That as the Attorneys of the late Supreme Court were held to be on a footing of equality with the Pleaders of the Sudder Court, and as the Attorneys now pass the same examination as the Attorneys of the Supreme Court used to do, it would be an act of injustice and hardship to deprive them of the privilege of pleading. This, your Memorialists submit, would depend upon two things, *viz.*, that the qualifications of a Pleader of the High Court are on a footing of equality with those of the Vakeels of the Sudder Court, and that the Attorney's qualifications are sufficient for a Pleader of the High Court. But your Memorialists are not prepared to admit either of these propositions. The qualifications of a Pleader of the High Court and of a Vakeel of the late Sudder Court are not equal, nor were they ever intended to be so. In the days of the old Sudder Court any person could be enrolled as a Vakeel; no previous general education was required as a preliminary criterion of fitness, nor were they ever required to pass such a comprehensive legal examination as the Pleaders of the High Court are now required to do.

Then, again, if the qualifications of the Attorney were sufficient for fitting a person to be a Pleader of the High Court, your Memorialists cannot understand why such broad distinctions should have been made in the Charter of 1862 between the two classes. In fact, it was not so considered by the framers of the Act of Parliament and the Charter. But a very different and a superior set of qualifications were contemplated in the case of persons who were to be admitted as Pleaders of the High Court. It was likewise not so considered by the Court itself for the last ten years. (2) But it may be said that upon the establishment of the High Court the Attorneys of the Supreme Court were enrolled as Vakeels. This, your Memorialists submit was done because, at the time, the Court did not consider it advisable to interfere with the existing rights of any class of persons. The Attorneys, like the Pleaders, many of whom had passed no examination whatever for becoming Pleaders, were enrolled as Vakeels



only because at the time they were, or had the privileges of, the Vakeels of the Sudder Court. (3) It may, perhaps, be said that the persons who now become Vakeels do not pass any examination higher than that of the Pleaders of the Sudder Court or the Attorneys of the High Court. This your Memorialists are unable to admit. In their humble opinion the qualifications of a person admitted as a Vakeel of this Court are superior to the qualifications of both those classes of persons. The degree of B. L. is only conferred on those who have previously qualified themselves as graduates of the University by passing the Bachelor of Arts Examination, and who have been under the tuition of a Barrister or other duly qualified persons for the full period of three years. And it is those alone who have obtained this degree of B. L. who are admitted and enrolled as Pleaders of this Court. On the other hand, any person could become a Pleader of the Sudder Court without any such general and technical education; and any person may become an Attorney, and does, in fact, become so, without any previous education, by serving out the articles for five years and passing an examination of which Jurisprudence and the Revenue Law form no part—subjects in which the candidates for the B. L. degree are examined, and which, your Memorialists submit, are essentially necessary for the due performance of the duties of a Vakeel. But assuming it to be correct that the Pleaders do not pass any higher examination, your Memorialists do not see how that circumstance can be a ground for admitting Attorneys as Pleaders. It can, at best, be only a proof of the necessity of raising the standard of examination for the admission of persons as Vakeels. It was clearly the intention of the Charter Act and the Letters Patent that Vakeels of the High Court should possess superior qualifications, and if, in the opinion of the Court, those who have been admitted hitherto are not possessed of such qualifications, the proper remedy, in the opinion of your humble Memorialists, is to raise the standard of qualifications still higher. (4) It may be said that the Attorneys acquire a better knowledge of conveyancing. This, your Memorialists submit, is only as regards the English form of conveyancing. But your Memorialists fail to perceive any necessary connection between the business of conveyancing and the duties required by the Charter to be performed by any one of the

three classes of practitioners mentioned therein. It is a distinct and separate calling altogether, and may be pursued by any person not necessarily an Attorney who possesses sufficient experience to secure public confidence. (5) It may further be said that the Attorneys acquire a superior training by serving an apprenticeship for five years. Your Memorialists submit that persons holding the degrees of Bachelor of Laws receive a much higher order of training, and their training is, or ought to be, at least equally efficient—better grounded as they are in other respects. But, further, the experience, which may possibly be acquired by an Attorney's Clerk, can be only in matters of detail in the business of acting—matters not peculiarly difficult to learn, and are comparatively of less importance to a Pleader of an Appellate Court, whose duties must necessarily be to a considerable extent the duties of an Advocate. Your Memorialists do not deny that under the wording of Sections 9 and 10 of the Letters Patent of 1865, any person may be admitted as a Vakeel, so may any person be admitted as an Advocate or an Attorney. What, however, your Memorialists feel as a grievance is that when the rights and privileges of the other classes have been preserved and protected, those of your petitioners only have been allowed to be trenchanted upon, more particularly as your Memorialists are not aware of any deterioration in their body as regards either ability, character, or efficiency, which can call for such an innovation.

Next, as to the second Resolution, your Memorialists apprehend that in denying to the Pleaders the power of acting as Attorneys, except under the conditions therein stated, the Court has not sufficiently taken into consideration the circumstances which have been set forth above and the alterations which have taken place in the rules relating to the procedure of the Court. It might, no doubt, have been necessary to insist upon those conditions if the system of procedure which obtained in the late Supreme Court still existed. But the modes of procedure in the two sides of the Court have now been very nearly assimilated to one another. The Civil and Criminal proceedings of the Court are now governed by the Acts of the Government of India. The proceedings connected with the testamentary and intestate jurisdiction are regulated by Act X of 1865, which is part of the subjects in which the candidates for the B. L. degree are examined. That



even as respects proceedings coming under the cognizance of the Court in the exercise of its Admiralty, Vice-admiralty and Matrimonial Jurisdictions, they are regulated as far as possible by the provisions of Act VIII of 1859 and other Acts amending or altering the same. There are only a few cases which are governed by the Rules and Regulations mentioned in para. 5 of the Rules of Practice, dated 4th April 1866. But your Memorialists feel confident that those who have successfully passed the examinations, and receive an education and training such as the Pleaders of this Court have, will be able to acquaint themselves with those Rules and Regulations so as to be able to efficiently discharge the duties connected therewith.

Your Memorialists therefore are unable to find any ground for their exclusion from the acting business of the Original Side of the Court. They have the right by the Charter to appear and act for the suitors in the said Court; and as there is no longer any substantial ground for their exclusion from the exercise of that right, your Memorialists humbly submit that they should have been allowed to appear and act without any restriction.

That upon all these grounds your Memorialists humbly pray that this Hon'ble Court will be pleased to reconsider the Resolutions under consideration, and if necessary make such other Resolutions in place thereof as to it may seem fit and proper with reference to the reasons and observations submitted above.

And your Memorialists, as in duty bound, shall ever pray, &c., &c.

TO THE HON'BLE SIR RICHARD COUCH,  
Kt., Chief Justice, and his Companion Jus-  
tices of the said High Court.

The humble Memorial of the un-  
dersigned, Vakeels of the said  
Court,

SHEWETH,

That with reference to the provisions of the Letters Patent constituting the High Court of Judicature for the Bengal Division of the Presidency of Fort William, bearing date the 14th day of May 1862 and the 28th day of

December 1865, relative to the admission and privileges of the Vakeels of the High Court aforesaid, your Memorialists beg that the Rules which were passed by the High Court on the 6th of July 1862, as well as those on the subject which were declared to have effect from the coming into operation of the New Charter of the Court, dated the 28th of December 1865, and by which your Memorialists were ordinarily precluded from appearing, pleading, or acting for any suitor in any matter of Ordinary Original Jurisdiction, Civil or Criminal, of the said High Court, may be reconsidered together with certain other Rules passed on the 19th of January 1871 for the admission and enrolment of Mooktears on the Appellate Side of the said High Court, which your Memorialists believe to be in direct opposition to, and contravention of, the provisions of the Letters Patent hereinbefore referred to.

That Section 8 of the Letters Patent, dated 14th of May 1862, which have since been revoked ran thus :—

"And we do further authorize and empower the said High Court of Judicature at Fort William in Bengal to approve, admit, and enrol such and so many Vakeels as to the said High Court shall seem meet, who shall be and are hereby authorized to appear, plead, and act for the suitors of the said High Court, subject to the rules and directions of such Court."

And Section 10 of the said Letters Patent of the said date stood thus :—

"And we do hereby ordain that the said High Court of Judicature at Fort William in Bengal shall have power to make Rules for the qualification and admission of proper persons to be Advocates, Vakeels, and Attorneys-at-Law of the said High Court, and shall be empowered to remove, on reasonable cause, the said Advocates, Vakeels, or Attorneys-at-Law; and no person whatsoever but such Advocates or Vakeels shall be allowed to plead for, or on behalf of, any suitor in the said High Court, and no person or persons whatever but such Vakeels or Attorneys-at-Law shall be allowed to act for any suitor in the said High Court, except that any suitor shall be allowed to appear, plead, or act on his own behalf, or on behalf of a co-sutor."

That in para. 11 of the Despatch of the Secretary of State for India, to the Governor-General of India in Council, regarding the High Court, occurs the following sentence :—

"The Advocate and Attorney will, respectively, plead and act in the High Court, and the Vakeel will both plead and act in the High Court as he did in the Sudder Court."

That, referring to the Sections of the Letters Patent quoted above, the High

Court, on the 6th of July 1862, passed the Rules herein before alluded to, of which Rule 7 provided that "Vakeels shall not appear, plead, or act for any suitor in this Court in matter of Ordinary Original Jurisdiction, Civil or Criminal, in any matter of appeal from any case of Ordinary Original Civil Jurisdiction, unless upon appeal from a judgment in a case of such Original Civil Jurisdiction, a question of Hindoo or Mahomedan law, or a question of usago shall arise, and unless the Court or a Judge thereof, shall think fit to admit a Vakeel or Vakeels to plead for any suitor or suitors in that case. In such case the Vakeel or Vakeels so admitted may plead accordingly."

Rule 8 provided that "A Vakeel shall be at liberty to appear, act and plead in any case removed under the provisions of Section 13 of the Letters Patent granted in pursuance of Acts 24 and 25 Victoria, Chap. 104."

That by Section 9 of the Letters Patent for the High Court of Judicature at Fort William in Bengal, bearing date 28th December 1865, by which the Letters Patent of 14th of May 1862 were removed, it is provided :—

"And we do hereby authorize and empower the said High Court of Judicature at Fort William in Bengal to approve, admit, and enrol such and so many Advocates, Vakeels, and Attorneys as to the said Court shall seem meet; and such Advocates, Vakeels, and Attorneys shall be and are hereby authorized to appear for the suitors of the said High Court, and to plead or to act, or to plead and act, for the said suitors, according as the said High Court may by its rules and directions determine, and subject to such rules and directions."

Section 10 of the said Letters Patent runs thus :—

"And we do hereby ordain that the said High Court of Judicature at Fort William in Bengal shall have power to make rules for the qualification and admission of proper persons to be Advocates, Vakeels, and Attorneys-at-law, and no person whatsoever but such Advocates, Vakeels or Attorneys shall be allowed to act or to plead for, or on behalf of, any suitors in the said High Court, except that any suitor shall be allowed to appear, plead, or act on his own behalf or on behalf of a co-sutor."

That in advertence to the above provisions of the Letters Patent last referred to, the High Court passed certain Rules. Rule 11 whereof provides that—

"Vakeels may appear, act and plead for suitors in this Court, provided that they shall not appear, plead or act for any suitor in any matter of Ordinary Original Jurisdiction, Civil or Criminal, or in any

matter of appeal from any case of Ordinary Original Civil Jurisdiction, unless upon appeal from a judgment in a case of such Original Civil Jurisdiction a question of Hindoo or Mahomedan law or usage shall arise, and unless the Court, or a Judge thereof, shall think fit to admit a Vakeel or Vakeels to plead for any suitor or suitors in that case. In such case the Vakeel or Vakeels so admitted may plead accordingly."

Rule 12 runs thus ;—

"A Vakeel shall be at liberty to appear, act and plead in any case removed under the provisions of Section 13 of the said Letters Patent."

That reading the several Sections as above cited of the said Letters Patent of 1862 and 1865, it appears to your Memorialists that it could never have been the intention of the framers of the said Letters Patent to restrict the professional practice of your Memorialists to *one side* of the Court. In fact, they seem to regard the High Court as a *whole*, without any reference to the nature of the jurisdiction it may exercise under the Charters by which it was constituted. Indeed, by the fusion of the late Supreme Court and the Sudder Dewauny Adalat, the two Courts became one indivisible whole, under the designation of the High Court of Judicature at Fort William in Bengal. Now, in Section 8 of the Letters Patent of 1862, as above quoted, the Vakeels "are authorized to appear, plead and act for the *suitors* of the said High Court, subject to the rules and directions of such Court." It is evident from the words used, that the functions which the Vakeels were to exercise under the Charter aforesaid were threefold, to wit, they could appear, they could plead, and they could act for *all* suitors of the said High Court quite irrespective of the question whether the suits in which such suitors were interested came before the High Court in appeal from the Mofussil Courts, or were pending before it as original suits or as appeals from decrees passed in such original suits. The proviso "subject to the rules and directions of such Court" relates only to the procedure so far as *entering appearance, pleading, or acting* is concerned, as is evident from the context and the collocation of the words employed, and could never have been intended to exclude the Vakeels from appearing, pleading, and acting in any particular class or classes of suits which might come before the High Court.

That Section 9 of the Letters Patent of 28th December 1865, provides that the Ad-

vocates, Vakeels and Attorneys of the High Court "shall be and are hereby authorized to appear for the suitors of the said High Court and to plead or to act, or to plead and act, for the said suitors according as the said High Court may, by its rules and directions, determine, and subject to such rules and directions." Now, by the Charter of 1862, the Advocates could only plead, the Vakeels could plead and act, and Attorneys could only act. The Charter, however, of 1865 does not appear to be so framed as to perpetuate the restrictions; Section 9 of the Letters Patent of 28th December 1865, lays down the law on the subject of the privileges of the Advocates, the Vakeels, and the Attorneys in the matter of appearing, pleading, pleading and acting for suitors of the High Court. Under that Section these three classes of legal practitioners may appear and plead, may appear and act, or may appear, plead and act, according as the High Court may, by its rules and directions, determine, and subject to such rules and directions." It is clear that this latter proviso "subject to such rules and directions" refer to the discretionary powers of the High Court to regulate by "rules and directions" the privileges of the Advocates, the Vakeels and the Attorneys, as to whether all the said three classes of legal practitioners or any one or more of the said classes, and, if so, which of the said classes are to be allowed to appear and plead, or appear and act, or to appear, plead and act "for the suitors of the said High Court." Evidently, the provisional clause above quoted has not and cannot possibly have any bearing upon the exclusion of the Vakeels from appearing, pleading and acting for any suitors in any matter of Ordinary Original Civil Jurisdiction, Civil or Criminal, or in matters of appeal generally from any case of Ordinary Original Civil Jurisdiction of the High Court.

That the Rules framed and passed by the High Court on 16th July 1862, and the Rules subsequently promulgated with effect from the coming into operation of the Charter of the High Court, dated 28th December 1865, appear thus to militate against the provisions of the Letters Patent of 1862 and 1865 as above set forth, and to be subversive of a considerable portion of the rights and privileges conferred on your Memorialists by the Letters Patent aforesaid, inasmuch as the said Rules shut your Memorialists out

from practising as Vakeels in the Original side of the High Court.

That by the Letters Patent of 1862 the Vakeels therein referred to were authorized to appear, plead and act in the High Court, which includes both sides of the Court; that the Letters Patent of 1865 do not appear to have taken away any rights or privileges which had been conferred on any class of legal practitioners by the Charter of 1862; consequently, those of your Memorialists who were admitted as Vakeels of the High Court between the dates of the said two Charters which constituted the said High Court, consider themselves entitled to appear and plead and act for suitors in the High Court in all suits that may come before the said High Court in its Original side, as well as in its Appellate side; and that in respect of those of your Memorialists who were admitted and enrolled as Vakeels of the High Court after the 28th day of December 1865, the Court was authorized to determine, by its rules and directions, whether they were to be allowed to appear and plead, or to appear and plead and act in the High Court, and by virtue of that authority the privileges of acting and pleading in the said High Court having been conceded to the said Memorialists the said privileges must have reference to *both sides* of the Court and to *all* manner of suits and appeals that may come for judicial determination before the said Court.

That the Rules of the High Court aforesaid appear to your Memorialists to be anomalous. While by them the Vakeels are privileged, under certain conditions therein specified, to appear and plead in appeals from judgments passed in cases of Original Civil Jurisdiction of the High Court, involving questions of Hindoo and Mahomedan law, they (the Vakeels) are shut out from appearing and pleading in those *very* cases in their earlier or original state.

That your Memorialists beg to refer next to the Rules which were passed by the High Court on the 19th January 1871, which have trenchanted on the privileges guaranteed to your Memorialists, along with the Attorneys, by the Charter of 1865.

That the last Clause of Section 10 of the Letters Patent, dated the 28th December 1865, runs thus:—

"And no person whatever but such Advocates, Vakeels, or Attorneys, shall be allowed to act or, to

plead for, or on behalf of, any suitors in the said High Court, except that any suitors shall be allowed to appear, plead or act on his own behalf, or on behalf of his co-sutor.

That under the Rules hereinbefore referred to a fourth class of practitioners has been introduced in the High Court, whose duties, as defined under the said rules, are—

1. To instruct Counsel or Vakeel.
2. To inspect the records of any Civil or Criminal Case in which he is engaged as Mooktear; and, if necessary, to obtain copies of any papers or documents, in order to the preparation of a brief, or instruction for Counsel or Vakeel employed or to be employed in the case.
3. To deposit in the office money or securities on behalf of his client.
4. To withdraw money or securities deposited on accounts of his clients.
5. To receive back original or other documents filed in any case after the case shall have been completely disposed of.
6. And generally to do all other such duties on behalf of his clients as Mooktears are now, according to the existing practice in the Court, empowered to do.

That although the said Rules cannot be said to have yet come fairly into operation, your Memorialists believe that they encroach upon the rights conferred exclusively by the Charter upon your Memorialists, and the Attorneys inasmuch as the duties to be performed by the Mooktears, as set forth in the Rules referred to, come directly within the purview of what is called *acting* in the Letters Patent hereinbefore mentioned, as has been already held by the High Court.

That under the circumstances as detailed above, your Memorialists most respectfully beg that your Lordships will be pleased to re-consider the Rules of 6th July 1862, and those which were passed with reference to the Charter of 28th December 1865, as well as the Rules of 19th January 1871 anent the admission and enrolment of the Mooktears of the High Court, and so to alter or modify them as to your Lordships may seem meet and proper under the law.

And your Memorialists, as in duty bound, shall ever pray, &c.

FORT WILLIAM,

April , 1872. }

## Orders by the Lieutenant-Governor of Bengal.

### Revenue and General Departments.

No. 1122R.

#### APPOINTMENTS.

*The 30th May 1872.*—Mr. R. C. Hamilton, who has recently been appointed to officiate as an Extra Assistant Commissioner in the Sonthal Pergunnahs, is vested with the powers of a Subordinate Magistrate of the second class.

*The 3rd June 1872.*—Mr. Alfred Augustus Wace, Assistant Magistrate and Collector of Meherpore, is transferred temporarily to the Sudder Station of Nuddea.

Mr. Jack Francis Needham, Deputy Magistrate and Deputy Collector, to have temporary charge of the Sub-division of Meherpore.

Baboo Kaliprosonno Sircar, B. A., Deputy Magistrate and Deputy Collector, Jessore, on leave, is transferred to the Sudder Station of Nuddea.

Baboo Chunder Mohun Roy, Deputy Magistrate and Deputy Collector, Furreedpore, is transferred to Mymensing.

Baboo Mothoornath Das to be Sub-Registrar of Assurances of the Sub-district of Dantoon, in Midnapore.

Mr. James Cosserat, Sub-Deputy Opium Agent of Hajeeopore, to have charge of the Sub-Deputy Opium Agency of Tirhoot, in addition to his present duties, during the absence, on leave, of Mr. Reginald Drake, or until further orders.

*The 4th June 1872.*—Lord Henry Ulic Browne to be Commissioner of Revenue and Circuit of the Presidency Division, but to continue to officiate as Chairman of the Justices of the Peace for the town of Calcutta, &c., until further orders.

The following Officers are appointed to officiate as Joint-Magistrates and Deputy Collectors of the Second Grade :—

Mr. George Lucian Taylor Harris.

„ Andrew William Cochran.

„ Alfred Augustus Wace, during the deputation of Mr. W. B. Oldham, or until further orders.

Baboo Dhonesh Chunder Roy, Officiating Deputy Magistrate and Deputy Collector, Chumparun, temporarily posted to Shahabad, is transferred to Tirhoot.

Baboo Luchminarain, Officiating Deputy Magistrate and Deputy Collector, Tirhoot, is transferred to Chumparun.

### LEAVE OF ABSENCE.

*The 30th May 1872.*—Baboo Gunga Gobind Surmah, Extra Assistant Commissioner of Seebaugor, for twelve days, from the 15th ultimo, under Section 5, Supplement F of the Civil Leave Code, in extension of the leave which was granted to him by the High Court while he was a Moonsiff in that District.

*The 1st June 1872.*—Mr. William Masters, Sub-Deputy Opium Agent of Patna, for eighteen months, of medical certificate, under Section 3, Supplement F of the Civil Leave Code, together with subsidiary leave for a period not exceeding thirty days, from the date on which he has availed himself of it.

*The 4th June 1872.*—Colonel John Colpoys Haughton, C.S.I., Commissioner of Cooch Behar, for three months, under Section 18 of the Civil Leave Code, from the date on which he may be relieved.

### NOTIFICATIONS.

*The 3rd June 1872.*—The orders of the 27th April last transferring Deputy Magistrate and Deputy Collector Mr. Alexander John Fraser to Backergunge are cancelled. Mr. Fraser will remain at Furrerapore until further orders.

Baboo Bhoo bunnessur Sing, Deputy Magistrate and Deputy Collector of Nattore, having availed himself of only six days' leave out of that which was granted to him under orders of the 27th April last, the unexpired portion of it is cancelled.

Under Section 1, Act X (B.C.) of 1871. (The District Road Cess Act), the Lieutenant-Governor is pleased to extend the aforesaid Act to the district of Maunbhoon. The Act will commence and take effect from the 1st July 1872.

*Erratum.*—From the Notification on this subject, published at page 2342 of the *Gazette* of 29th May, omit the words "with the exception of Dhulbhoon."

*The 4th June 1872.*—The Lieutenant-Governor is pleased to publish the following rules under Act III of 1872, in supersession of those published in the *Calcutta Gazette* of the 22nd May 1872, page 2322.

1. With reference to section 12 of Act III of 1872, the Lieutenant-Governor has been pleased to rule that for the present marriages shall be registered by ex-officio Registrars only at the office of the Marriage Registrar, and at no other place.

2. Under the provisions of section 14 of the Act, the Lieutenant-Governor has been pleased to prescribe the following scale of fees to be charged by a Marriage Registrar for the duties to be discharged by him:—

Rs. As. P.

- |  |   |   |   |
|--|---|---|---|
| (1) For receiving notice of marriage under section 4 of the Act ...  | 0 | 8 | 0 |
| (2) For receiving objection to such notice under section 6 ...   | 0 | 8 | 0 |
| (3) For receipt of declaration under section 10 and subsequent attendance at marriage in the Registrar's Office, section 11... | 1 | 0 | 0 |
| (4) For giving a certified extract from marriage certificate book, section 14  | 0 | 8 | 0 |
| (5) For registration of marriage already contracted, section 20 ...  | 1 | 0 | 0 |
| (6) For registering a marriage at any other time than the office hours prescribed by Rule 3 an extra fee of ...                | 2 | 0 | 0 |

3 Every Registrar must give public notice of the place where he holds his office, and is bound to register marriages there. All registrations at the office are to be made between the hours of 10 A.M. and 5 P.M., unless the special fee mentioned in rule 2, clause 6, is paid.

4. The place, other than a Registrar's office, where a marriage is to be registered by a Registrar other than an ex-officio Registrar shall be determined by the parties themselves, who shall specify such place in writing at the time when the notice of intended marriage is given to the Registrar.

5. If such place is not more than five miles distant from the Registrar's office the fee for registering the marriage shall be Rs. 4, and if more than five miles distant an additional fee of 4 annas per mile shall be charged.

6. When a marriage is solemnized at any place other than the Registrar's office it may be registered at any reasonable hour.

7. All Registrars are required to post a notice of every intended marriage publicly and conspicuously in their offices, for fourteen days before registering such marriage.

*The 4th June 1872.*—The Lieutenant-Governor has been pleased to appoint the following gentlemen to be Registrars of Marriages under Act III. of 1872 at the under-mentioned places:—

Calcutta ...	{ Babu Norendronath Sen.
	{ Doorga Mohun Dass.
Hooghly ...	„ Sib Chandra Deb.
Dacca ...	„ Govindra Chandra Dass.

The jurisdiction of the Registrars for Calcutta shall be conterminous with that of the original ordinary civil jurisdiction of the High Court; and that of the Registrars for Hooghly and Dacca, with the civil jurisdiction of the respective Judges of those districts.

H. L. DAMPIER,  
*Secy. to the Govt. of Bengal.*

#### APPOINTMENTS.

*The 29th May 1872.*—Babu Peary Mohun Chowdry is appointed to be an Honorary Magistrate at Sheropore, in the District of Mymensing, and is vested with the powers of a Subordinate Magistrate of the Second Class.

*The 30th May 1872.*—The following gentlemen to be Municipal Commissioners for the Town of Burdwan, viz:—

Mr. R. T. Sevestre.  
Babu Prosonno Coomar Ghose.  
„ Bhoobun Mohun Chatterjee.  
Hakim Kunchun Ally.

*The 31st May 1872.*—Mr. James Hughes to be Medical Officer of Tipperah, but to continue to officiate as Medical Officer of Nowgong, during the absence, on duty, of Dr. J. Meredith, or until further orders.

Dr. William Cowan, to officiate as Medical Officer of Tipperah, during the absence, on duty, of Mr. James Hughes, or until further orders.

Babu Poorno Chunder Shome to officiate as Subordinate Judge of Beerbhoom, during the absence, on leave, of Babu Nobocomar Bauerjee, or until further orders.

Third Grade Sub-Assistant Surgeon Sonaton Bysack, to have charge of the Julpigore Dispensary.

*The 1st June 1872.*—Babu Russick Lal Bose to be Subordinate Judge of Chittagong.

Babu Kadarnath Banerjee, Officiating Subordinate Judge of Tipperah, to be Subordinate Judge of that District.

Mr. L. W. Hutchinson, on furlough, to be Judge of the Small Cause Courts of Dacca, Naraingunge, and Bohor.

*The 3rd June 1872.*—Babu Behariloll Mullick, B. L., to officiate as Moonsiff of Hermtabad, in Dinagopore, during the absence, on leave, of Babu Koylash Chunder Mookerjee, or until further orders.

Mr. Arthur Clifford Tuto, B. A., to be temporarily Secretary to the Local Committee of Public Instruction at Sarun.

The following gentlemen to be Members of the Committee for the management of the Charitable Dispensary at Takee, in the 24-Pergunnahs:—

Babu Umasunker Roy Chowdry.  
„ Rajmohun Roy Chowdry.  
„ Radhamadhub Bose.

Dr. William Grant Clark to be a Member of the Municipal Committee of Jamalpore.

#### LEAVE OF ABSENCE.

*The 31st May 1872.*—Mr. Hector Munro, Assistant Superintendent of Police, Backergunge, for six months, under Section 5, Supplement F of the Civil Leave Code, together with ten days' subsidiary leave.

Mr. Charles Raban, Officiating Assistant Superintendent of Police, Sylhet, for two months, under Clause 1, Section 12, Supplement F of the Civil Leave Code.

Babu Nobocoomar Banerjee, Subordinate Judge of Beerbhoom, for two months under Section 18 of the Civil Leave Code.

*The 3rd June 1872.*—Dr. Theobald Mathew, Civil Surgeon of Monghyr, for 15 days, under Section 18 of the Civil Leave Code, from the 16th May 1872.

#### NOTIFICATION.

*The 30th May 1872.*—The Lieutenant-Governor is pleased to accept the resignation tendered by the following gentlemen of their appointments as Municipal Commissioners for the town of Burdwan, *viz* :—

Babu Madan Lall Burmon.  
 „ Panjah Lall Burmon.  
 „ Munshi Zohad Ruheem.

*The 31st May 1872.*—In supersession of the orders of the 13th March last, it is hereby notified that Mr. Henry Leland Harrison, B. A., officiated for Mr. R. L. Martin as Inspector of Schools, South-west Division, in the second class of the Bengal Educational Service, from the forenoon of the 9th to the afternoon of the 30th March last, in addition to the duties connected with his special appointment.

*The 4th June 1872.*—The services of the following officers are replaced at the disposal of the Government of India in the Military Department, *viz* :—

Major G. A. Brown.  
 Captain C. H. Palmer.

C. BERNARD,

*Offg. Secy. to the Govt. of Bengal.*

*The 31st May 1872.*—In supersession of so much of the Notification of the 24th March 1869, published in the *Calcutta Gazette* of the 31st idem, as defines the boundaries of the town of Buxar, in the district of Shahabad, for the purposes of Act VI. (B. C.) of 1868, it is hereby notified that the boundaries of the said town, for the purposes of the said Act, are as specified below :—

*Buxar.*—Bounded on the north by the Ganges, on the south by the line of fencing to the southern side of the railroad, on the east by Rajabagh, and on the west by Stud Stallion Stable and the new Bazar and Paure Puttee road (including this road):

C. BERNARD,

*Offg. Secy. to the Govt. of Bengal.*

The following order, issued by the Government of India, in the Foreign Department, is republished for general information :—

*No. 1015.—Simla, the 23rd May 1872.—Notification.—General.*—During the absence of His Excellency the Viceroy and Governor-General in Council from the Presidency, Colonel B. E. Bacon, Officiating Secretary in the Military Department, will have charge of that portion of the Foreign Office which is left at Calcutta.

C. BERNARD,

*Offg. Secy. to the Govt. of Bengal.*



# THE LAW OBSERVER.

Vol. I.]

JULY 15, 1872.

[No. 2.]

## *Criminal Sessions—High Court— Undefended Native Prisoners.*

WE have already indicated the evil, it now remains for us to point out the remedy. The remedy, we think, is simple enough. It does not involve any pecuniary considerations in the shape of an additional outlay. No extra judges or other officers are required. We have only to utilize the services of the interpreters now attached to the Court. There is now a full complement of those officers on the regular establishment; and if these did their duty with a little more zeal and assiduity, we are sure the evil complained of would disappear at once. All that is necessary to be done, is, that one of these gentlemen should be made to translate to the prisoner in his colloquial mother-tongue, the opening address of the Standing Counsel, as well as the questions put and the answers returned by the witnesses. If the prisoner is duly made acquainted with these, there is some possibility, if he is the victim of a conspiracy or otherwise innocent, of his being able to break down the case which may have been trumped up against him.

What we would accordingly suggest is, that the High Court will pass an order directing that an interpreter should, in every instance, explain to the prisoner all that we have pointed out to be absolutely necessary to enable him to make

a proper defence, and we have not the least doubt, but that this will be regarded as an improvement upon the present routine. This rule ought to be followed in every instance in which the prisoner happens to be undefended. If he is smart enough to comprehend, with the assistance of an interpreter, the substance and nature of the proceedings against him, there is some chance of his making a tolerably good defence. But if he happens to be below the average standard of intelligence, as ninety-nine out of one hundred native prisoners are, we do not think there is much chance of his vindicating his innocence with success, even with the assistance we would fain give him. In such cases, we think, the Court ought to direct some Junior Counsel, that may happen to be disengaged at the time, to take up the defence, and we have no doubt but that every lawyer, who can afford to do it, so far from shirking this task, will consider himself well employed, in thus being enabled to do such a noble act in the interests of justice and humanity.

Since writing the above, we have been informed that an interpreter was employed in the last case of the Criminal Sessions, for June last to translate to the prisoner all that was said or urged against him. We trust that this rule will be followed in every instance, and that the gentlemen, who may be entrusted with the onerous duty of interpreting to the prisoners



what is brought forward against them, will be fully alive to the great responsibility which attaches to their office, and will endeavour to acquit themselves in such a manner as may reflect credit on all concerned.

### *Special Appeal—Law of,—Its History, and a Suggestion.*

BEFORE we discuss the propriety or otherwise of amending the existing law of special appeal, we think it necessary, for the benefit of our uninitiated readers, to trace, in the first instance, the several changes, which were made from time to time, in the law which related to such appeals.

Lord Cornwallis in 1793 inaugurated, as is well known, a new and auspicious era in the history of British India. He established Courts of Justice at convenient distances from one another, and promulgated a code of Regulations for their guidance. That code bears ample testimony to that nobleman's ability as a statesman, and breadth and liberality of views as a philanthropist. The preamble to Regulation 3 of 1793, which has since been repealed, contained a fair exposition of the policy which was adopted by the Government of the day in the Judicial Department. It ran thus:—

"The many valuable privileges and immunities, which have been conferred upon the natives of these provinces, evince the solicitude of the British Government to promote their welfare, and must satisfy them that the regulations which may be adopted for the internal government of the country, will be calculated to preserve to them the laws of the Shaster and the Koran in matters to which they have been invariably applied; to protect them in the free exercise of their religion, and to afford security to their persons and property. The benefit, however, which they would derive solely from regulations enacted for the above purposes, would be but partial, unless the judicial estab-

lishments for dispensing those regulations are framed upon principles which will render them the means of protecting private rights and property under the changes and temporary derangements to which all forms of Government must occasionally be liable. To ensure, therefore, to the people of this country, as far as is practicable, the uninterrupted enjoyment of the inestimable benefit of good laws, duly administered, Government has determined to divest itself of the power of interfering in the administration of laws and regulations in the first instance, reserving only as a Court of appeal or review, the decision of certain cases as a last resort; and to lodge its authority in Courts of Justice, the judges of which shall not only be bound by the most solemn oaths to dispense the laws and regulations impartially, but be so circumstanced as to have no plea for not discharging their high and important trusts with diligence and uprightness: they have resolved that the authority of the laws and regulations so lodged in the Courts shall extend not only to all suits between native individuals, but that the officers of Government employed in the collection of the revenue, the provision of the Company's investment and all other financial or commercial concerns of the public, shall be amenable to the Courts for acts done in their official capacity in opposition to the regulations; and that Government itself, in superintending these various branches of the resources of the State, may be precluded from injuring private property. They have determined to submit the claims and interests of the public in such matters, to be decided by the Courts of Justice, according to the regulations, in the same manner as suits between individuals. To deprive the Judges of the Courts the power of delaying or denying justice, the Governor-General-in-Council has determined to frame the constitution of the Courts upon such principles as will enable every individual, by the mere observance of certain forms, to command at all times the exercise of the judicial power of the

State thus lodged in the Courts for the redress of any injury which he may have sustained in his person or property."

Thus it is evident that the Government of Lord Cornwallis was pledged to see that *justice* was done to all classes of its subjects in all possible contingences that might arise.

With a view, therefore, to afford redress to parties considering themselves aggrieved by the decisions of the Courts of first instance, an appeal lay under the regulations to the Sudder Dewany Adalat, then composed of the Governor-General and Members of the Supreme Council. But such appeals were restricted to cases in which the sum or value of the property in suit exceeded one thousand sicca Rupees; or in the case of an estate paying revenue to Government, if the annual revenue exceeded that amount; or in respect of lackheraj lands if the annual produce thereof exceeded one hundred sicca Rupees.

Under such restrictions, by in far the greater number of cases, there lay no appeal at all. To obviate therefore this inconvenience, Regulation 5 of 1793 was enacted, by which Provincial Courts of Appeal were established with powers to receive and decide such appeals from the decisions of the Zillah Courts as the Sudder Dewany Adalat was precluded under the law from taking cognizance of with reference to the pecuniary limitations to which we have alluded above.

By subsequent Regulations, Subordinate Court or Courts exercising limited pecuniary jurisdiction were established, and the decrees of the Zillah or City Adalat in appeals from the decisions of those Courts were declared to be final, and no second or special appeal lay from such decrees. But this state of things could not be suffered to continue long. The necessity of second or special appeals soon became apparent, and accordingly we find a provision for special appeals made for the first time in Regulation 49 of 1803. Section 24, Clause 1 of that Regulation ran thus:—

"Suits tried in the first instance by the native Commissioners or by the

Registrars of the Zillah and City Courts, and heard in appeal by the Judges of those Courts, may also occasionally involve questions of a general and important nature; particularly in causes between landholders or farmers of land and the ryots, for arrears or exactions of rent, wherein the rights of the landlord and tenant may be at issue; and an erroneous decision not removeable by appeal might be of serious ill consequences. It is, therefore, hereby provided that in all cases wherein a regular appeal may not lie to the Provincial Courts of Appeal from the decrees of the Judges of the Zillah and City Courts, under the present or any other Regulation, it shall be competent to the Provincial Court to admit a special appeal, (on performance of the general conditions of appeals) if on the face of the decree of the Zillah or City Judge, or from any information before the Provincial Court, it shall appear to them erroneous or unjust; or if, from the nature of the cause, as stated in the decree, or otherwise, it shall appear to them of sufficient importance to merit a further investigation in appeal."

By Clause 1, Section 10, Regulation 2 of 1805, the power vested in the Provincial Courts of Appeal under the law as above quoted was declared to be vested in the Sudder Dewany Adalat as herein below set forth.

"The power which has been vested in the Provincial Courts of Appeal by Section 24, Regulation 49 of 1803, to admit a special appeal from the decrees of the Zillah and City Courts in cases wherein a regular appeal may not lie to them if on the face of the decree or from any information before the Court of Appeal, it shall appear to them erroneous or unjust, or if from the nature of the cause, as stated in the decree or otherwise, it shall appear to them of sufficient importance to merit a further investigation in appeal, it is hereby declared to be equally vested in the Court of the Sudder Dewany Adalat, with respect to any decrees passed by the Provincial Courts of Appeal, which

from the amount or value of the cause of action, may not be open to a regular appeal to that Court, but on any of the grounds stated, may appear to merit a further investigation."

By Section 9, Regulation 8 of 1805, these provisions were extended to the Ceded and Conquered Provinces.

The above provisions were thus modified by Section 2, Clause 1, Regulation 26 of 1814:—

"In modification of the provisions contained in Section 24, Regulation 49 of 1803, Section 10, Regulation 2 of 1805, and Clauses second and third, Section 9, Regulation 8 of 1805, it is hereby enacted, that from and after the 1st of February 1815, no special appeal or second appeal shall be admitted by a Zillah or City Judge, by a Provincial Court, or by the Sudder Dewany Adalut, unless upon the face of the decree, or of documents exhibited with it, (assuming all the facts of the case as stated in the decree) the judgment shall appear to be inconsistent with some established judicial precedent, or with some Regulation in force, or with the Hindoo or Mahomedan Law in cases which are required to be decided by those laws, or with any other law or usage which may be applicable to the case, or unless the judgment shall involve some point of general interest or importance, not before decided by the superior Courts."

Clause 1, Section 7, Regulation 19 of 1817 provided that:—

"In addition to the grounds on which second or special appeals are declared admissible, in the first clause of Section 2, Regulation 26 of 1814, that such appeals may be admitted, when the judgment against which the appeal is preferred shall, from the exhibition of another decree of the same Court, or of another Court having jurisdiction in the same suit, or in a suit founded on a similar cause of action, clearly appear to be in opposition thereto, or inconsistent with such other judgment."

The next legislative reference to the subject is to be found in Clause 2, Section

4, Regulation 2 of 1825 which stood thus:—

"After the promulgation of this Regulation, the Provincial Courts and the Court of Sudder Dewany Adalut shall be guided, in their admission of special or second appeals, by the rules contained in Section 2, Regulation 26 of 1814, Section 7, Regulation 19 of 1817 and Sections 3, 4 and 5 of Regulation 9 of 1819."

Act III of 1843 introduced a wholesale change on the subject. Section 1 ran thus:—

"It is hereby enacted, that from and after the first day of May next a special appeal shall lie to the Courts of Sudder Dewany Adalut at Calcutta and Allahabad respectively, to the Court of Sudder Dewany Adalut at Madras, and to the Court of Sudder Dewany Adalut at Bombay, from all decisions passed on regular appeals in the Civil Courts subordinate to them respectively, which shall appear to be inconsistent with some law or usage having the force of law or some practice of the Courts or shall involve some question of law, usage or practice, upon which there may be a reasonable doubt."

This law remained in force till it was superseded by Act XVI of 1853. Under this enactment special appeals could lie on any of the following grounds:—

"1st.—On the ground that the decision hath failed to determine all material points in difference in the cause, or hath determined the same or any of them contrary to law, or usage having the force of law.

2nd.—On the ground of "misconstruction of any document.

3rd.—On the ground of any ambiguity in the decision affecting the merits.

4th.—On the ground of any substantial error or defect in procedure or in the investigation of the case, provided such errors or defect be apparent on the record, and shall have produced or be likely to have produced any error or defect in the decision of the case upon the merits. Provided always that no such appeal shall lie, nor shall any such decision be reversed, altered or remanded

by any of the said Sudder Courts upon the ground that the decision of any question of fact is contrary to or not warranted by the evidence duly taken in the cause or any probability deduced from the record."

The above Act having been rescinded, Section 372, Act VIII of 1859 is the present law on the subject. The Section is quoted below:—

"Unless otherwise provided by any law for the time being in force, a special appeal shall lie to the Sudder Court from all decisions passed in regular appeal by the Courts subordinate to the Sudder Court, on the ground of the decision being contrary to some law or usage having the force of law, or of a substantial error or defect in law in the procedure or investigation of the case, which may have produced errors or defect in the decision of the case upon the merits and on no other ground."

The above Section has been slightly modified by Section 27, Act XXIII of 1861.—

"No special appeal shall lie from any decision or order, which shall be passed on regular appeal after the passing of this Act, by any Court subordinate to the Sudder Court, in any suit of the nature cognizable in Courts of Small Causes under Act XLII of 1860, when the debt, damage or demand, for which the original suit shall be instituted, shall not exceed five hundred Rupees; but every such order or decision shall be final."

For Sudder Court, the reader may substitute the High Court, under which name the Supreme and the Sudder Courts were amalgamated and fused into one, on the first day of July 1862.

By a comparison of the language of Section 4, Act XVI of 1853 with that of Section 372, Act VIII of 1859, it will be found that the grounds of special appeal have been considerably narrowed by the latter enactment. Those grounds under the existing code of procedure are only two—namely,

1st.—That the decision is contrary to some law or usage having the force of law.

2nd.—That there has been some substantial error or defect in law in the procedure or investigation of the case which has produced error or defect in the decision of the case upon the merits. Under the existing law, misconstruction of a document, failure by the Lower Courts to determine all material points in difference in the cause, ambiguity in the decision affecting the merits, are no grounds of special appeal although they were so under the law of 1853. Practically, however, the Judges of the late Sudder Court and of the High Court until recently decided special appeals as if the old law was still in force. Misconstruction of a document or ambiguity in a decision affecting the merits was held by the Judges to be a good ground of special appeal, although the law was silent on the subject. A change however has now come over the spirit of their dream. Special appeals are now at a very great discount. What has contributed to this result we do not pretend to know. But the fact is certain that special appeals are not now in good odour as is evidenced by the present falling off in their number. In 1863, they amounted to about 4000, and in 1871, their number did not exceed 1400. This result, we are sure, is partly due to the rule by which special appeals are required to be presented in open Court; but that alone is not enough to account for this extraordinary diminution in their number. Perhaps the decisions of the Lower Appellate Courts satisfy generally all parties concerned, and therefore it is but seldom that the parties cast think of trying their chance in special appeal. Well may the Judges of the High Court congratulate themselves in having secured such efficient subordinate judicial agency! Perhaps the present state of the file of the High Court is an earnest of what may yet be expected to follow by and bye. In all probability, a judicial millennium is at hand when litigation will cease to embroil the land and the "limbs of the law" will be allowed to find their level and enjoy their *otium cum dignitate*.

to their heart's content. That indeed is a consummation devoutly to be wished.

In sober sooth, one, who does not mix freely with all classes of people in the Mofussil, can hardly realize a correct idea of the general discontent that prevails in the community at large at the off-hand manner in which cases are decided by our Courts, especially in first appeal. True, there is a legal provision in the Statute Book for second or special appeals, but as such appeals are limited only to points of law, the provision is rendered nugatory by arbitrary findings of fact which cannot be impeached or questioned in special appeal. We have often seen careful and well-considered judgments of the Courts of first instance, coolly reversed on appeal, simply on the ground, that the *Hakim* of the Appellate Court chooses to disbelieve the evidence relied on by the first Court or takes a fancy to believe the evidence which such first Court did not think, for reasons set forth in the judgment, proper to trust. We have also seen points of law studiously shirked and avoided in first appeal, and the case decided on facts, in respect of which the appellate *Huzoor*, in nine cases out of ten, makes it a point to arrive at a conclusion diametrically opposed to the findings of the first Court. Now, however correct and sound the judgment of the Court of first instance, and however absurd or erroneous the decision of the second Court may appear to the High Court in special appeal, that Court is really powerless for good or evil in the present state of the law.

It is all very well in theory to say, that a system of appeals is generally subversive of the true ends of justice. But it must be conceded on all hands, that in practice appeals constitute the best safeguard against the caprice and incapacity of the lower Courts. Is it possible for a moment to believe, that a Subordinate Judge, hearing an appeal from the decision of a *Moonsiff*, would venture to jump to a different conclusion on facts from what the *Moonsiff* had arrived at, if he knew that there lay a further appeal on facts to a higher tribunal?

The fact however is, as we have already stated, Courts of first appeal very often most arbitrarily find facts contrary to the findings of the Courts of first instance, and reverse very good judgments, compared to which, their own scarcely deserve the name. The present state of the law of special appeal affords them the scope for the indulgence of their whims, and the result is a general discontent throughout the country.

Of the judicial machinery, as at present constituted, Mr. Fitz James Stephens speaks thus:—

"Civil judicial work is at present ill done, inasmuch as the inferior Judges are better trained for it than superior Judges who are not trained at all. Appeals in most cases lie from a better to a worse instructed tribunal, which cannot be regarded as in any sense inferior to the one appealed to."

It is time, therefore, that the law of special appeal should be amended. What we would suggest is, that where the Courts of first and second instance differed on facts, it should be competent to the High Court to decide in special appeal as to which of the lower Courts had arrived at a correct conclusion on the evidence, and that where the two lower Courts concurred in the findings of fact, a special appeal should lie to the High Court, only on points of law as provided in Section 372, Act VIII of 1859.

The suggestion we have made is based upon the judicial policy inaugurated by Lord Cornwallis as has been already set forth. We are not aware that that policy has been departed from in even a single instance. Government has always conscientiously adhered to it; and no considerations can influence it to adopt any other not in keeping with the letter and spirit of that policy. Every wrong must have a remedy, and justice must be done to all.

We have pointed out how justice miscarries and how well considered judgments are most wantonly and capriciously reversed, simply because, among other reasons, the decisions in appeal are not open to a further appeal on the evidence.

The High Court in special appeal cannot interfere with a decision on the facts, however absurd or otherwise erroneous it may appear on the face of it. *A propos* of a remarkable saying of a Judge of the High Court that "in special appeal the Court does not sit to do justice," it may be observed that it is at once fully conclusive as to the utter inefficacy of the present law of special appeal to grapple with the evil which we have pointed out.

Appeals to a higher local tribunal would certainly be unnecessary if the Courts of first instance were properly constituted and presided over by officers of acknowledged ability, integrity, and experience, as the late Supreme Court was in its day. But as that is an impossibility, we think that, considering the nature of the constitution of the Mofussil Bench, a system of appeals is absolutely indispensable, inasmuch as it is calculated to exercise a wholesome check upon the proceedings of the subordinate authorities. Moorsiffs accordingly do not, indeed cannot, indulge in such vagaries, as some of the gentlemen who happen to sit in appeal over their decisions are in the habit of doing.

Thus the necessity of the amendment of the law of special appeal, as we have proposed, being apparent, the next question that occurs is, whether it would involve any additional outlay. So far as we are aware of the state of the file of the High Court, the complement of Judges now attached to it appears to us to be more than equal to the additional work likely to be entailed upon them, in the event of our suggestion being carried out in its integrity. Even if additional Judges for the High Court were needed to meet the requirements of the amended law of special appeal as we have recommended, that consideration ought not to weigh against the expediency of modifying the existing law of special appeal in the manner we have suggested. Under the present limited jurisdiction which the High Court exercises over special appeals, it appears from the statistics which we have been able to collect,

that in about one-third of the total number of special appeals, the decisions of the Lower Appellate Courts were reversed or modified between 1863 and 1871. This surely is a very large percentage, and there is no knowing to what extent this percentage would have swelled had the High Court been competent, under the law in special appeal, to sift the evidence and decide on the merits. From the number of decisions now annually reversed or modified in special appeal, it is clear that special appeals are absolutely necessary for the ends of justice; but the scope of the law ought to be enlarged, in the manner we have suggested, to admit of justice being done in a vast number of cases in which the parties affected by the decision, of the first Appellate Courts are at present wholly without a remedy.

### *Law Reports and Law Reporting.*

LAW REPORTING as synonymous with the publication of reports of cases decided by the Courts, is not a new institution in this part of British India, being coeval, as is well known, with the establishment of our Courts. It dates so far back as 1793, when the Governor-General sat on the bench of the Sudder Court and dispensed justice to the teeming millions of these provinces,—a fact to which the Select Reports fully testify. These Reports are the repository of some of the ablest and most learned expositions of some of the most knotty and complicated questions of Hindoo and Mahomedan Law, and are even now referred to as furnishing a guide to enable our Judges to arrive at correct conclusions, in cases involving points similar to those which formed the subject of judicial disquisition more than half a century or thereabouts ago. True, the Reports were not drawn up on the model of the English Law Reports, but the decisions were recorded with such particularity of detail and in such clear and forcible language, that the practitioner, who may have occasion to refer



to them, has in general nothing to complain of. The facts are set forth in full, the points for decision are laid down with precision, and the judgments are recorded with a degree of care and learned research which are really marvellous.

These Reports were followed by the *Sudder Dewany Reports*, which are generally, so far as reporting is concerned, as full and as good as those which preceded them. Those indeed were the palmy days of Law Reports. Even the *Zillah* decisions were reported, although we must not be understood to mean that these latter are worth much from a legal point of view. Simultaneously with these, were issued from time to time, Reports of cases decided by the *Sudder Dewany Adalat* for the North-western Provinces.

Of the late Supreme Court, we have no serial Reports, digested year by year. *Montriou's Reports*, *Morton's Reports*, *Taylor and Bell's Reports*, *Fulton's Reports*, *Bulnois's Reports*, *Hyde's Reports* &c., are all that relate to cases decided by the Supreme Court, and since the amalgamation, by the High Court in its Ordinary Original Jurisdiction in its early days. The cases reported in these are on the English model.

Since the establishment of the High Court, we have had a variety of Reports of cases decided in its appellate side. First of all are the Reports edited by *Babu Romesh Chunder Mitter*, *Vakeel High Court*, and published by Messrs. *G. C. Hay & Co.* These extend over a period of full one year, that is from July 1862 to June 1863.

About the year 1863 *Mr. Marshall, Barrister-at-Law*, was appointed by the High Court, on a fixed salary, to report the cases which had been decided by the Court in its appellate side, in the second half of 1862 and the early part of 1863. That gentleman accordingly addressed himself to the task, and acquitted himself in a manner which did him great credit, as is evidenced by the volume of Reports which passes by his name.

About the latter part of 1864, *Mr. Sutherland* projected the *Weekly Reporter*,

to which is certainly due the credit of having done more for the enlightenment of the *Mofussil* bench and the bar than any other publication of the kind. As a speculation, too, it has answered remarkably well.

Between June 1863, when *Babu Romesh Chunder's Reports* terminated, and the publication of the *Weekly Reporter* in October 1864, the gap has been supplied by the Reports subsequently published by Messrs. *Sevestre and Sutherland*.

*The Legal Remembrancer* was a short-lived publication. It lived about four months only.

*The Indian Jurist*, a publication of considerable merit, along with leading articles and other matter contained also reports of some important cases decided in both sides of the High Court. The First Series terminated with the death of its lamented editor *Mr. Martin*, and the New Series was commenced only to be discontinued not long afterwards.

*Wyman's Revenue and Police Journal* did for some time good service as a law journal. It died, however, not long after it was born to be resuscitated, phoenix-like, with however a wider scope, in *Wyman's Civil, Revenue and Criminal Reporter*. But this journal, in spite of the care bestowed upon it, could ill stand competition with the *Weekly Reporter*, and therefore it was discontinued.

The *Bengal Law Reports* were next ushered into existence under the patronage of Government. It met with a formidable rival in the *Weekly Reporter*, and both have since been struggling for existence. Certainly, both these publications are well conducted, but, as we think, there is room yet left for improvement, and as the field is large enough for other publications of the kind, we have ventured to start *The Law Observer*, although its scope embraces a wider range, as will be gathered from the Prospectus hereunto appended.

Besides these reports, there are *Mr. Sevestre's Reports*, which are published every now and then at that gentleman's convenience.

That law-reporting has of late excited considerable attention is a fact too patent to be overlooked. Public journalists are now discussing the subject, and even High Government officials do not think it *infra dig* to turn their thoughts to it. Indeed, Government has already granted a subsidy to get up a set of Reports under its own auspices. These Reports, to be sure, are drawn up generally with care, but they nevertheless failed to elicit the approbation of the late legal member of our Supreme Council. Mr. Fitz James Stephen, after describing the present condition of law-reporting in India, observes that "if it was the intention of Government to enervate the administration of justice, to make application of legal principles impossible, and to foster all the weaknesses which are usually said to be the characteristic of the native intellect; they could not spend their money better than by encouraging a system like this. I do not believe that one case in twenty of those which are reported is at all worth reporting, and when we think what the High Courts are, it seems to be little less than monstrous to make every division bench into a little legislature which is to be continually occupied in making binding precedents, with all of which every Court and Magistrate in the country is bound to be acquainted. Careful Reports of great cases are, perhaps, the most instructive kind of legal literature; but I know nothing which so completely enervates the mind and prevents it from regarding law as a whole or as depending upon any principles at all as the habit of continually dwelling upon, or referring to minute decisions upon every petty question which occurs."

Mr. Fitz James Stephen is certainly a great authority; but we cannot afford to endorse all that he has chosen to urge against the present system of law-reporting. We are free to admit, that a great many of the decisions, that have been reported, should not have been reported at all, as involving no questions of importance in a legal point of view. Certainly, cases which turn upon facts only

and embody no general principles, are useless as precedents; but we do not quite see how Mr. Stephen is justified in saying that "When we think what the High Courts are, it seems to me little less than monstrous to make every division bench into a little legislature which is continually occupied in making precedents." So far as we are aware, the High Courts are composed of Barrister Judges and Civilian of considerable local knowledge and experience, and as such they afford the best guarantee for the soundness of the interpretation which they think it fit to put on the laws which they are bound to administer. The Legislature is not always happy in the language in which the laws they pass are couched, and consequently, to apply to the law makers to amend the law every time a Judge meets with an ambiguous or obscure expression in the Acts, would be simply absurd, inasmuch as there would be no end of these applications. Mr. Stephen seems to be impressed with very high notions of the dignity of the Legislature, and, accordingly, he would not allow the Judges of the High Court even to interpret what has been forged at the legislative anvil. If the Judges of the High Court are incompetent, as he would fain make us believe, to interpret the laws, or to enunciate general principles, we wonder why they should be suffered to sit on the bench of the highest tribunal of appellate jurisdiction in the country, and, at such an enormous cost to the State, to perpetrate all manner of inconsistent decisions at the expense of the unfortunate suitors who might happen to come before them. This is really uncharitable.

Besides, if the Judges of the High Court are not fit, as Mr. Stephen thinks, to be entrusted with the interpretation of the laws passed by the Legislature, it is really impossible to form an idea of the stuff of which the inferior Judges, the gentlemen who preside in the District Courts, are made of. Indeed, there would be very little hope for the country, if there was any foundation for Mr. Stephen's estimate of the judicial ability of



the Judges of our highest tribunal. If the Judges are really incompetent, why not replace them by men of Stephen's own calibre of mind? If their judgments cannot bear the light, is it proper to entrust them with the decision of cases involving questions of life, liberty, and property of millions of Her Majesty's lieges? Now, assuming for a moment for argument's sake that Mr. Stephen's premises were correct, we should like to know which was more mischievous in its tendency;—whether the publication of the decisions perpetrated by our Judges, or their being suffered to continue on the bench as such?

The *Pioneer* newspaper takes up the subject, and, in his admiration of the amiable virtues of Mr. Stephen, overshoots the mark. He says—

“The Mofussil bench and bar are being utterly demoralized by the flood of so-called precedents that is monthly poured over them. No Judge will now exercise his own judgment, or apply to the facts before him the broad maxims of law which he has, or ought to have learnt.”

This, surely, is a broad sweep. We do not know exactly whether the decisions of the High Court have so far demoralized the Mofussil bench and the bar as to have taken away from the Judges the power of freely exercising their own judgment in the disposal of the cases which they have to decide. If this fact is true, it pre-supposes, in the first instance, that the Judges of the High Court are not worthy of their hire, and that the so-called precedents are utterly worthless as such; and in the second place, that the Mofussil Judges are worse, and that in the absence of their power of discrimination, they shallow husks, chaff, and all that are offered them every month by the editors of the *Weekly Reporter* and the *Bengal Law Reports*. If the Mofussil bar and the bench are really what they are represented to be, what guarantee have we that, if they depended upon their own resources and were left wholly without the *Law Reports*, the Judges would decide the cases that came before them

better than they do at present? Without the decisions of the High Courts to guide them, they would be on the bench like mariners in the midst of a wide ocean—their compass and pole star lost. Besides, it does not appear to us that the decisions of the High Court are so absurd, as he would have us believe. One decision, he parades in particular as utterly unfit for publication,—being to the effect that “the mere act of fishing in a tank is no proof of ownership.” Does the *Pioneer* know what gave rise to this decision? Some Mofussil Daniel had found, without looking to the other facts connected with the case, that a certain individual was the owner of a tank because he used to fish in it, and had accordingly passed a decree in his favor. In appeal, the High Court set aside the decision, as it was evident that he fished in the tank without any proprietary right, and therefore the mere act of fishing in a tank was no proof of ownership.

The *Pioneer* cries down the *Weekly Reporter* as furnishing much “unwholesome spoon meat to the nascent judicial mind.” The plan is to publish every judgment that seems in the most vague or indistinct manner to indicate a ruling on a point of law on any but the simplest combination of facts. To the transcript of every judgment is prefixed a note or an abstract purporting to set forth the points decided by the Court. Opening a volume at random, we find that many of these are in themselves absolutely erroneous as mere abstracts.”

Of the *Bengal Law Reports*, the *Pioneer*, after describing the mode in which the Reports are got up, says—

“It is obvious that this state of things was but little more satisfactory than that before subsisting. Again it was found that the *Bengal Law Reports* had no chance of commanding an extensive sale, so long as the quantity of matter was inferior to that of its rival. Accordingly, to meet the commercial necessities of the case, a mass of useless rubbish is printed along with the regular Reports. True, it is put down in small type and called an appendix, but

it is a disfiguring feature and a departure from the original plan. Up to date, it will be seen that we consider the *Bengal Law Reports* a comparative failure."

There is certainly much truth in the above observations, but we do not quite understand how the *Pioneer* was persuaded to put forward "the scheme," which we reproduce elsewhere, for putting down the abuses which he points out. He would fain throw back the civilization of the country by upwards of a century, and initiate a system of judicial procedure, more in keeping with the spirit of oriental despotisms than the enlightened policy which has hitherto characterized the British Indian Government. If there is any thing wrong in the decisions of the Judges, care ought to be taken to remove the evil at its source. There is no use hiding the fact if the country is really smarting under a radically bad judicial system. If the decisions of our Courts are really worthless, the evil ought to be removed, not by burking them, but by replacing the authors of those decisions by abler hands.

Let us now examine in detail the merits of "the scheme" propounded by our Allahabad contemporary. We will take up the different heads *seriatim*.

1st.—Our contemporary suggests that Government ought to put a stop to the publication of all but a single edition of Law Reports, and, if necessary, to prohibit reference, by Counsel in argument or by the Judges in their judgment, to any but the sanctioned reports. This, surely, is a most absurd proposition, which, to be carried out in its entirety, pre-supposes the most arbitrary stretch of executive authority. By this plan, Government is to have the monopoly of the reporting business and to prohibit reference to any other Reports. What an idea in the latter half of the 19th century!!!

2nd.—This proposition is a corollary to the first, as it is neither more nor less than that the Reports are to be published only by Government in the Legislative Department.

3rd.—By this proposition, the Chief Justices are to be *ex-officio* members of the Legislature, and that they are to control and superintend the reporting of the decisions of their Courts. The experiment, as regarded the first clause of the suggestion, was tried not long ago, and we all know how it succeeded. Government found it not a very easy matter to influence the opinions of our late Chief Justice Sir Barnes Peacock, as a member of the Legislature, as that gentleman, true to his instincts, was ever and anon on the alert to resist any arbitrary measure which Government thought it expedient to introduce into the Council. The result was, that he was excluded from the Legislative Board by the first available opportunity. Now, what guarantee have we that the present and future Chief Justices, if admitted into the Legislature, will not follow in the wake of Sir Barnes?

With reference to the second Clause of the proposition, it appears to us, that our Chief Justices may make themselves more useful by a proper discharge of their legitimate duties, than by controlling and superintending the reporting of their decisions. We are free to confess that we do not quite see the benefits which are likely to result from the Chief Justices frittering away their talents at the Reporter's desk. The idea, however, is quite original!

Our contemporary would also strengthen the Legislature by the addition of the Civilians who may take special interest in law. We think we have already had there more than enough of the Civilian element. It was high time, we think, that amateur legislation were altogether done away with.

4th.—This proposition embraces details of "the scheme" put forward, namely, that there is to be an Amending Bills Committee, consisting of the legal member of Council as *ex-officio* Chairman and the Chief Justices as *ex-officio* members. This requires no comments. Our contemporary would leave nothing for the Judges to decide at their discretion. He would convert them into mere puppets.

5th.—By this proposition, our contemporary would secure as wide a publicity for the Bills as possible. He would publish them in the official Gazette. This is really very kind of him.

6th.—By this proposition, the Standing Committee are to decide which of the cases referred by the Chief Justices are to be reported. So the Chief Justices must bow to the opinions of the learned gentlemen composing the Standing Committee, as to which of the Reports are to be published and which not. This, to be sure, is non-pareil.

7th.—Our contemporary proposes under this head, that the Reporters are to be appointed officers of the Court, and that Reports of all important cases are to be submitted to the Chief Justices, who in consultation with their colleagues, are to consider whether any amendments of the existing law are necessary. We have already said, that we do not quite relish the idea of the Judges having any thing to do with the reporting business. The Judges, we think, are presumed to be acquainted with the present state of the law, and if they consider any law to be defective or otherwise unjust or improper, they may move the Legislature for amendment, without the aid of the Reporters and their Reports.

8th.—Our contemporary proposes, under this head, to relieve the High Courts of all civil work, except certain specified classes of cases, and of all criminal work, except the trial of European British subjects. How then, in the name of goodness, are the Judges of the High Court to employ themselves? Perhaps our contemporary would make sinecures of their appointments. The most important question however is, what would our friends of the long robe say to the arrangement proposed by our contemporary?

9th.—And lastly, our contemporary proposes to define, by legislation in the clearest manner possible, "the powers of the High Courts, their procedure and the laws to be administered by them. He proposes also to assimilate their procedure with that of the Mofussil Courts.

Now, in Civil suits, the procedure in the High Court has been, we believe, the same as in the Courts in the interior of the country since July 1862, both being regulated by Act VIII of 1859, and by the amended Code Criminal Procedure, the material differences that existed in the mode of trials by the High Courts and other Courts have been removed to a great extent. We believe also that the powers of the High Court and the laws they administer are already well-known and sufficiently well defined. The suggestion of our contemporary does not, therefore, appear to be *à propos* or otherwise necessary.

Now, having pointed out the absurdity of the propositions advanced by the *Pioneer*, we will conclude this article with a few remarks on the present system of reporting, which, so far as we are aware, is far from satisfactory. That system consists in getting up the facts of the cases to be reported from what is technically called "the Record," and in drawing upon the imagination for the arguments used by Counsel on either side. This, certainly, is any thing but desirable, and yet this, we fear, holds good in respect of most of the cases reported. In favor of the *Weekly Reporter*, however, even this much cannot be predicated, as it gives *only* the judgments without the facts and the arguments used by Counsel. What we like to see is, that Reports be carefully prepared from notes taken down at "the hearing" and that if there is any doubt in the mind of the Reporter as to any facts, it may be at once removed by a reference to "the Record." Unless this plan is scrupulously followed out in every instance, we do not see there is any chance of our getting what may be called and relied on as a set of "correct" reports.

We have always considered law-reporting to be a necessary adjunct of every civilized Government, calculated, as it is, not only to instruct the inferior tribunals, but to operate as a sort of check to the violence and caprice of the higher Judges. It acts also as a safeguard against ignorant and otherwise incapable persons being

pitchforked on the bench, by sheer dint of interest.

If the cases decided by our High Courts were properly reported, the reading public would certainly be not a little edified by the interesting conversations which generally take place between the bench and the bar in the course of the arguments, and which, while they relieve the dull solemnity of the scene around, contribute not a little to the amusement of those that happen to be present then and there. Law Reports constitute the bulk of the literature of the Law. To make Government officials the sole purveyors of this commodity, would pre-suppose a state of things which was far from creditable to the judicial administration of the country. Indeed, Government can no more interfere with the publication of the Reports by individual members of the legal profession than it can authoritatively put a stop to private enterprise in the shape of commercial speculation. Let there be as many editions of the Law Reports as professional gentlemen may think it worth their while to get up, and that which is got up best can alone command an extensive sale and prove remunerative. The rest will fall still-born from the Press.

It is said that the High Courts govern the country, and there appears to be some truth in the remark. This, however, is a state of things, the very idea of which, a certain class of Europeans can ill afford to brook. It has, accordingly, been the fashion with them of late to cry down law and lawyers, as not at all suited to the exigencies of the country. It ought to be governed, say they, by the executive *ala* Cowan. Government according to them began by a wrong move, and, as it is never too late to rectify an error, it is time, they cry out, that steps should be taken to mend matters which have already come to the worst. Evidently, here "the wish is father to the thought." In answer to these benevolent statesmen, we will content ourselves by quoting the following passage from the *Edinburgh Review* for October 1869 embodying, as it does, the

opinion of a gentleman who, from the high official position, he occupies in the country, is entitled to speak authoritatively on the subject:—

"It has been assumed in a sort of off-hand way, and stated by persons whose statements carry weight, that the law to be applied in India is peculiarly 'simple and easy,' and that very little knowledge of law is required by persons whose duty it is to take part in the administration of it. It is true, that the subjects of litigation in India are as yet comparatively few, but the statement that questions of law presented are simple or easy of solution we most emphatically deny. On the contrary, we affirm—and an hour's inspection of any volume of Indian Law Reports will prove it,—that the difficulties which beset an Indian tribunal in disposing of questions of law can hardly be paralleled in any country in the world. In the first place, a difficulty more frequently presents itself there than anywhere else on what is known as *the conflict of law*; one of those knotty questions on which the sharpest legal intellects have frequently blunted their edge. In the next place, whether the litigants be Hindoos or Mahomedans, we find them already in possession of a system of law in the highest degree abstruse, subtle, and minute, and these laws every Judge has to apply. The Indian system of land tenure also is extraordinarily complicated. Even the commonest relation of social life, that of the Hindoo family, is so difficult to be conceived and understood that no European has ever ventured to write a treatise upon it; and the law of our creation, vast in extent and seldom clear in expression, comprising the rules of limitation, minute distinctions between crimes, an elaborate civil and criminal procedure, and the law of mortgage, is certainly not less difficult than the analogous law in Europe."

And yet the *Pioneer* would fain reduce these complicated systems of law into a few *simple rules* of the Legislature which any body and every body was competent to interpret on the bench. Whatever decision was come to by the

Judges on a given point of law, might be embodied into an Act and passed. Thus, according to our contemporary, no Law Reports would be necessary. The idea certainly is a novel one, and an original one to boot. What we wonder at is, that an Englishman, born and bred under one of the most complicated systems of law extant, should so far forget his natural instincts as to advocate seriously the introduction in this country of a state of things which may not inaptly be characterized as "lawless." Before we conclude, we may assure our contemporary, in the language of one of the greatest lawyers and statesmen that ever lived, that "no code can supersede the profession of the Lawyer."

Let Hercules do what he may;  
Cat will mew and dog have his day.

OUR readers will remember that in the appeal of Sreemutty Sreemutty Dossee *versus* Sreemutty Soudaminee Dossee, it was held\* by Justices L. S. Jackson and W. Markby that in suits valued at more than Rs. five thousand, and decided in the first instance by a Subordinate Judge, if the appeal was laid at less than Rs. five thousand, such appeal did not lie direct to the High Court under Section 22, Act VI of 1871. This was certainly a novel ruling, in consequence of which the Deputy Registrar of the High Court submitted before the First Bench, consisting of the Chief Justice and Justice Ainslie, all those Regular Appeals from the decisions of Subordinate Judges which were valued at less than Rs. five thousand, for orders,—the reference being based upon the ruling of the Divisional Bench above alluded to. Upon

this the First Bench ordered the appeals to be laid before a Full Bench, consisting of the Chief Justice and Justices Bayley, Markby, and Ainslie. The Full Bench have just decided that Section 22, Act VI of 1871 is no bar to such Regular Appeals being preferred to the High Court. We need hardly remind our subscribers that in the last Number of this Journal we put the same construction upon the Section referred to, and we are glad to find that the Honorable Judges of the Full Bench have arrived at the same conclusion. A full Report of the decision will appear in our next.

IN giving the judicial appointments in the last Number of the *Law Observer*, we only followed the example of the English Law Journals. The *Indian Jurist*, now defunct, furnished us as well with a precedent on the subject. But as many of our subscribers do not consider the information contained in them to be of any particular use to them, we have thought it proper to discontinue their publication.

Our readers will also perceive that, in modification of our Prospectus as originally published, we have given in the present Number the Rules of the Board of Revenue, for the benefit of our subscribers in the Revenue Department of the public service, and we propose to follow up this arrangement in all our subsequent issues. Our subscribers are welcome to forward to us any suggestions they may choose to make for the improvement of the Journal, and we will try to carry them out as far as practicable.

\* *Law Observer*, June 1872, Civil Rulings, p. 1.

### JUDGMENTS OF COURTS OF JUSTICE WHEN RELEVANT.

40. The existence of any judgment, order or decree which by law prevents any Court from taking cognizance of a suit or holding a trial, is a relevant fact when the question is whether such Court ought to take cognizance of such suit, or to hold such trial.

Previous judgments relevant to bar a second suit or trial.

41. A final judgment, order or decree of a competent Court, in the exercise of probate, matrimonial, Admiralty or insolvency jurisdiction, which confers upon or takes away from any person any legal character, or which declares any person to be entitled to any such character, or to be entitled to any specific thing, not as against any specified person but absolutely, is relevant when the existence of any such legal character, or the title of any such person to any such thing, is relevant.

Judgments in probate, &c., jurisdiction.

Such judgment, order or decree is conclusive proof

that any legal character which it confers accrued at the time when such judgment, order or decree came into operation;

that any legal character, to which it declares any such person to be entitled, accrued to that person at the time when such judgment declares it to have accrued to that person;

that any legal character which it takes away from any such person ceased at the time from which such judgment declared that it had ceased or should cease;

and that any thing to which it declares any person to be so entitled was the property of that person at the time from which such judgment declares that it had been or should be his property.

42. Judgments, orders or decrees other than those mentioned in section forty-one, are relevant if they relate to matters of a public nature relevant to the enquiry; but such judgments, orders or decrees are not conclusive proof of that which they state.

Judgment, order or decree between third parties when irrelevant and when not.

#### Illustration.

A sues B for trespass on his land. B alleges the existence of a public right of way over the land, which A denies.

The existence of a decree in favour of the defendant, in a suit by A against C for a trespass on the same land, in which C alleged the existence of the same right of way, is relevant, but it is not conclusive proof that the right of way exists.

43. Judgments, orders or decrees, other than those mentioned in section forty, forty-one and forty-two, are irrelevant, unless the existence of such judgment, order or decree, is a fact in issue, or is relevant under some other provision of this Act.

What judgments, &c., not relevant.

#### Illustrations.

(a.) A and B separately sue C for a libel which reflects upon each of them. C in each case says, that the matter alleged to be libellous is true, and the circumstances are such that it is probably true in each case, or in neither.

A obtains a decree against C for damages on the ground that C failed to make out his justification. The fact is irrelevant as between B and C.

(b.) A prosecutes B for adultery with C, A's wife.

B denies that C is A's wife, but the Court convicts B of adultery.

Afterwards, C is prosecuted for bigamy in marrying B during A's life-time. C says that she never was B's wife.

The judgment against B is irrelevant as against C.

(c.) A prosecutes B for stealing a cow from him. B is convicted.

A, afterwards, sues C for the cow, which B had sold to him before his conviction. As between A and C, the judgment against B is irrelevant.

(d.) A has obtained a decree for the possession of land against B. C, B's son, murders A in consequence.

The existence of the judgment is relevant, as showing motive for a crime.

44. Any party to a suit or other proceeding may show that any judgment, order or decree which is relevant under Section forty, forty-one or forty-two and which has been proved by the adverse party, was delivered by a Court not competent to deliver it, or was obtained by fraud or collusion.

Fraud, collusion and incompetency of Court may be proved.

### OPINIONS OF THIRD PERSONS WHEN RELEVANT.

45. When the Court has to form an opinion upon a point of foreign law, or of science or art, or as to identity of handwriting, the opinions upon that point of persons specially skilled in such foreign law, science or art, are relevant facts.

Such persons are called experts.



*Illustrations.*

(a.) The question is, whether the death of A was caused by poison.

The opinions of experts as to the symptoms produced by the poison by which A is supposed to have died, are relevant.

(b.) The question is, whether A, at the time of doing a certain act, was by reason of unsoundness of mind, incapable of knowing the nature of the act, or that he was doing what was either wrong or contrary to law.

The opinions of experts upon the question whether the symptoms exhibited by A commonly show unsoundness of mind, and whether such unsoundness of mind usually renders persons incapable of knowing the nature of the acts which they do, or of knowing that what they do is either wrong or contrary to law, are relevant.

(c.) The question is, whether a certain document was written by A. Another document is produced which is proved or admitted to have been written by A.

The opinions of experts on the question whether the two documents were written by the same person or by different persons, are relevant.

46. Facts, not otherwise relevant, are

*Facts bearing upon opinions of experts.* relevant if they support or are inconsistent with the opinions of experts when such opinions are relevant.

*Illustrations.*

(a.) The question is, whether A was poisoned by a certain poison.

The fact that other persons, who were poisoned by that poison, exhibited certain symptoms which experts affirm or deny to be the symptoms of that poison, is relevant.

(b.) The question is, whether an obstruction to a harbour is caused by a certain sea wall.

The fact that other harbours similarly situated in other respects, but where there were no such sea walls, began to be obstructed at about the same time, is relevant.

47. When the Court has to form an opinion as to the persons by

*Opinion as to handwriting.* whom any document was

written or signed, the opinion of any person acquainted with the handwriting of the person by whom it is supposed to be written or signed that it was or was not written or signed by that person, is a relevant fact.

*Explanation.*—A person is said to be acquainted with the handwriting of another person when he has seen that person write, or when he has received documents purporting to be written by that person in answer to documents written by himself or under his authority and addressed to that person, or when, in the ordinary course of business,

documents purporting to be written by that person have been habitually submitted to him.

*Illustration.*

The question is, whether a given letter is in the handwriting of A, a merchant in London.

B is a merchant in Calcutta, who has written letters addressed to A and received letters purporting to be written by him. C is B's clerk, whose duty it was to examine and file B's correspondence. D is B's broker, to whom B habitually submitted the letters purporting to be written by A for the purpose of advising with him thereon.

The opinions of B, C and D on the question whether the letter is in the handwriting of A are relevant though neither B, C nor D ever saw A write.

48. When the Court has to form an opinion as to the existence of

*Opinion as to existence of right or custom when relevant.* any general custom or right, the opinions as to the existence of such custom or right, of persons who would be likely to know of its existence if it existed, are relevant.

*Explanation.*—The expression 'general custom or right' includes customs or rights common to any considerable class of persons.

*Illustration.*

The right of the villagers of a particular village to use the water of a particular well is a general right within the meaning of this Section.

*Opinions as to usages, tenets, &c., when relevant.* 49. When the Court has to form an opinion as to—

the usages and tenets of any body of men or family,

the constitution and government of any religious or charitable foundation, or

the meaning of words or terms used in particular districts or by particular classes of people,

the opinions of persons having special means of knowledge thereon, are relevant facts.

50. When the Court has to form an opinion as to the relation-

*Opinion on relationship when relevant.* ship of one person to another, the opinion, expressed

by conduct, as to the existence of such relationship, of any person who, as a member of the family or otherwise, has special means of knowledge on the subject, is a relevant fact. Provided that such opinion shall not be sufficient to prove a marriage in proceedings under the Indian Divorce Act, or in prosecutions under Section four hundred and

ninety-four, four hundred and ninety-five, four hundred and ninety-seven or four hundred and ninety-eight of the Indian Penal Code.

#### Illustrations.

(a.) The question is, whether A and B were married.

The fact that they were usually received and treated by their friends as husband and wife, is relevant.

(b.) The question is, whether A was the legitimate son of B. The fact that A was always treated as such by members of the family, is relevant.

51. Whenever the opinion of any living person is relevant, the grounds on which such opinion is based are also relevant.

#### Illustration.

An expert may give an account of experiments performed by him for the purpose of forming his opinion.

#### CHARACTER WHEN RELEVANT.

52. In civil cases, the fact that the character of any person concerned is such as to render probable or improbable any conduct imputed to him, is irrelevant, except in so far as such character appears from facts otherwise relevant.

In civil cases, character to prove conduct imputed irrelevant.

53. In criminal proceedings, the fact that the person accused is of a good character, is relevant.

In criminal cases, previous good character relevant.

54. In criminal proceedings, the fact that the accused person had been previously convicted of any offence is relevant; but the fact that he has a bad character is irrelevant, unless evidence has been given that he has a good character, in which case it becomes relevant.

*Explanation.*—This section does not apply to cases in which the bad character of any person is itself a fact in issue.

55. In civil cases, the fact that the character of any person is such as to affect the amount of damages which he ought to receive, is relevant.

*Explanation.*—In sections fifty-two, fifty-three, fifty-four and fifty-five, the word 'character' includes both reputation and disposition; but evidence may be given only of general reputation and general disposition, and

not of particular acts by which reputation or disposition were shown.

## PART II.

### ON PROOF.

#### CHAPTER III.—FACTS WHICH NEED NOT BE PROVED.

56. No fact of which the Court will take judicial notice need be proved.

No evidence required of fact judicially noticed.

57. The Court shall take judicial notice of the following facts:—

(1.) All laws or rules having the force of law now or heretofore in force or hereafter to be in force in any part of British India:

(2.) All public Acts passed or hereafter to be passed by Parliament, and all local and personal Acts directed by Parliament to be judicially noticed:—

(3.) Articles of War for Her Majesty's Army or Navy:

(4.) The course of proceeding of Parliament and of the Councils for the purposes of making Laws and Regulations established under the Indian Councils' Act, or any other law for the time being relating thereto.

*Explanation.*—The word 'Parliament' in clauses (2) and (4) includes—

1. The Parliament of the United Kingdom of Great Britain and Ireland;

2. The Parliament of Great Britain;

3. The Parliament of England;

4. The Parliament of Scotland, and

5. The Parliament of Ireland.

(5.) The accession and the sign manual of the Sovereign for the time being of the United Kingdom of Great Britain and Ireland:

(6.) All seals of which English Courts take judicial notice: the seals of all the Courts of British India, and of all Courts out of British India, established by the authority of the Governor-General or any Local Government in Council: the seals of Courts of Admiralty and Maritime Jurisdiction and of Notaries public, and all seals which any person is authorized to use by any Act of Parliament or other Act or Regulation having the force of law in British India:

(7.) The accession to office, names, titles, functions, and signatures of the persons filling for the time being any public office in



any part of British India, if the fact of their appointment to such office is notified in the *Gazette of India*, or in the official Gazette of any Local Government:

(8.) The existence, title, and national flag of every State or Sovereign recognized by the British Crown:

(9.) The divisions of time, the geographical divisions of the world, and public festivals, fasts and holidays notified in the official Gazette:

(10.) The territories under the dominion of the British Crown:

(11.) The commencement, continuance, and termination of hostilities between the British Crown and any other State or body of persons:

(12.) The names of the members and officers of the Court, and of their deputies and subordinate officers and assistants, and also of all officers acting in execution of its process, and of all advocates, attornies, proctors, vakils, pleaders and other persons authorized by law to appear or act before it.

(13.) The rule of the road.

In all these cases, and also on all matters of public history, literature, science or art, the Court may resort for its aid to appropriate books or documents of reference.

If the Court is called upon by any person to take judicial notice of any fact, it may refuse to do so, unless and until such person produces any such book or document as it may consider necessary to enable it to do so.

58. No fact need be proved in any proceeding which the parties thereto or their agents agree

*Facts admitted.*

to admit at the hearing, or which, before the hearing, they agree to admit by any writing under their hands, or which by any rule of pleading in force at the time they are deemed to have admitted by their pleadings: Provided that the Court may, in its discretion, require the facts admitted to be proved otherwise than by such admissions.

#### CHAPTER IV.—OF ORAL EVIDENCE.

59. All facts, except the contents of documents, may be proved by oral evidence.

*Proof of facts by oral evidence.*

*Oral evidence must be direct.*

60. Oral evidence must, in all cases, whatever, be direct; That is to say—

If it refers to a fact which could be seen, it must be the evidence of a witness who says he saw it;

If it refers to a fact which could be heard, it must be the evidence of a witness who says he heard it;

If it refers to a fact which could be perceived by any other sense or in any other manner, it must be the evidence of a witness who says he perceived it by that sense or in that manner;

If it refers to an opinion or to the grounds on which that opinion is held, it must be the evidence of the person who holds that opinion on those grounds:

Provided that the opinions of experts expressed in any treatise commonly offered for sale, and the grounds on which such opinions are held, may be proved by the production of such treatises if the author is dead or cannot be found, or has become incapable of giving evidence, or cannot be called as a witness without an amount of delay or expense which the Court regards as unreasonable;

Provided also that, if oral evidence refers to the existence or condition of any material thing other than a document, the Court may, if it thinks fit, require the production of such material thing for its inspection.

#### CHAPTER V.—OF DOCUMENTARY EVIDENCE.

61. The contents of documents may be proved either by primary or by secondary evidence.

*Proof of contents of documents.*

62. Primary evidence means the document itself produced for the inspection of the Court.

*Primary evidence.*

*Explanation 1.*—Where a document is executed in several parts, each part is primary evidence of the document:

Where a document is executed in counterpart, each counterpart being executed by one or some of the parties only, each counterpart is primary evidence as against the parties executing it.

*Explanation 2.*—Where a number of documents are all made by one uniform process, as in the case of printing, lithography, or photography, each is primary evidence of the contents of the rest; but where they are all copies of a common original, they are not primary evidence of the contents of the original.

*Illustration.*

A person is shown to have been in possession of a number of placards, all printed at one time from one original. Any one of the placards is primary evidence of the contents of any other, but no one of them is primary evidence of the contents of the original.

63. Secondary evidence means and includes—

(1.) Certified copies given under the provisions hereinafter contained;

(2.) Copies made from the original by mechanical processes which in themselves insure the accuracy of the copy, and copies compared with such copies;

(3.) Copies made from or compared with the original;

(4.) Counterparts of documents as against the parties who did not execute them;

(5.) Oral accounts of the contents of a document given by some person who has himself seen it.

*Illustrations.*

(a.) A photograph of an original is secondary evidence of its contents, though the two have not been compared, if it is proved that the thing photographed was the original.

(b.) A copy compared with a copy of a letter made by a copying machine is secondary evidence of the contents of the letter, if it is shown that the copy made by the copying machine was made from the original.

(c.) A copy transcribed from a copy, but afterwards compared with the original, is secondary evidence; but the copy not so compared is not secondary evidence of the original, although the copy from which it was transcribed was compared with the original.

(d.) Neither an oral account of a copy compared with the original, nor an oral account of a photograph or machine-copy of the original, is secondary evidence of the original.

64. Documents must be proved by primary evidence except in the

Proof of documents by primary evidence.

65. Secondary evidence may be given of the existence, condition, or contents of a document in the following cases:—

Cases in which secondary evidence relating to documents may be given.

(a.) When the original is shown or appears to be in the possession or power of the person against whom the document is sought to be proved, or

of any person out of reach of, or not subject to, the process of the Court, or

of any person legally bound to produce it, and when, after the notice mentioned in section sixty-six, such person does not produce it;

(b.) When the existence, condition or contents of the original have been proved to be admitted in writing by the person against whom it is proved or by his representative in interest;

(c.) When the original has been destroyed or lost, or when the party offering evidence of its contents cannot, for any other reason not arising from his own default or neglect, produce it in reasonable time;

(d.) When the original is of such a nature as not to be easily moveable;

(e.) When the original is a public document within the meaning of section seventy-four;

(f.) When the original is a document of which a certified copy is permitted by this Act, or by any other law in force in British India, to be given in evidence;

(g.) When the originals consist of numerous accounts or other documents which cannot conveniently be examined in Court, and the fact to be proved is the general result of the whole collection;

(h.) When the original consists of numerous accounts or other documents which cannot conveniently be examined in Court, and the fact to be proved is the general result of the whole collection.

In cases (a), (c) and (d), any secondary evidence of the contents of the document is admissible.

In case (b), the written admission is admissible.

In case (e) or (f), a certified copy of the document, but no other kind of secondary evidence, is admissible.

In case (g), evidence may be given as to the general result of the documents by any person who has examined them, and who is skilled in the examination of such documents.

66. Secondary evidence of the contents of the documents referred to in section sixty-five,

Rules as to notice to produce. clause (a), shall not be given unless the party proposing to give such secondary evidence, has previously given to the party in whose possession or power the document is, such notice to produce it as is prescribed by law; and if no notice is prescribed by law, then such notice as the Court considers reasonable under the circumstances of the case;

Provided that such notice shall not be required in order to render secondary evi-

dence admissible in any of the following cases, or in any other case in which the Court thinks fit to dispense with it :—

(1.) When the document to be proved is itself a notice ;

(2.) When from the nature of the case, the adverse party must know that he will be required to produce it ;

(3.) When it appears or is proved that the adverse party has obtained possession of the original by fraud or force ;

(4.) When the adverse party or his agent has the original in Court ;

(5.) When the adverse party or his agent has admitted the loss of the document ;

(6.) When the person in possession of the document is out of reach of, or not subject to, the process of the Court.

67. If a document is alleged to be signed or to have been written wholly or in part by any person, the signature or the handwriting of so much of the document as is alleged to be in that person's handwriting must be proved to be in his handwriting.

68. If a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the Court and capable of giving evidence.

69. If no such attesting witness can be found, or if the document purports to have been executed in the United Kingdom, it must be proved that the attestation of one attesting witness at least is in his handwriting, and that the signature of the person executing the document is in the handwriting of that person.

70. The admission of a party to an attested document of its execution by himself shall be sufficient proof of its execution as against him, though it be a document required by law to be attested.

71. If the attesting witness denies or does not recollect the execution of the document, its execution may be proved by other evidence.

72. An attested document not required by law to be attested may be proved as if it was unattested.

73. In order to ascertain whether a signature, writing, or seal is that of the person by whom it purports to have been written or made, any signature, writing, or seal admitted or proved to the satisfaction of the Court to have been written or made by that person may be compared with the one which is to be proved, although that signature, writing, or seal has not been produced or proved for any other purpose.

The Court may direct any person present in Court to write any words or figures for the purpose of enabling the Court to compare the words or figures so written with any words or figures alleged to have been written by such person.

#### PUBLIC DOCUMENTS.

74. The following documents are public documents :—

1. Documents forming the Acts, or records of the Acts—

- (i) of the sovereign authority.
- (ii) of official bodies and tribunals, and
- (iii) of public officers, legislative, judicial and executive, whether of British India, or of any other part of Her Majesty's dominions, or of a foreign country.

2. Public records kept in British India of private documents.

75. All other documents are private.

76. Every public officer having the custody of a public document, which any person has a right to inspect, shall give that person on demand a copy of it on payment of the legal fees therefor, together with a certificate written at the foot of such copy that it is a true copy of such document or part thereof as the case may be, and such certificate shall be dated and subscribed by such officer with his name and his official title, and shall be sealed, whenever such officer is authorized by law to make use of a seal, and such copies so certified shall be called certified copies.

*Explanation.*—Any officer who, by the ordinary course of official duty, is authorised

to deliver such copies, shall be deemed to have the custody of such documents within the meaning of this section.

77. Such certified copies may be produced in proof of the contents of the public documents or parts of the public documents of which they purport to be copies.

Production of such copies.  
Proof of other official documents.

78. The following public documents may be proved as follows:—

(1.) Acts, orders or notifications of the Executive Government of British India in any of its departments, or of any Local Government or any department of any Local Government,

by the records of the departments certified by the heads of those departments respectively,

or by any document purporting to be printed by order of any such Government:

(2.) The proceedings of the Legislatures, by the journals of those bodies respectively, or by published Acts or abstracts, or by copies purporting to be printed by order of Government:

(3.) Proclamations, orders or regulations issued by Her Majesty or by the Privy Council, or by any department of Her Majesty's Government,

by copies or extracts contained in the *London Gazette*, or purporting to be printed by the Queen's Printer:

(4.) The Acts of the Executive or the proceedings of the legislature of a foreign country,

by journals published by their authority, or commonly received in that country as such, or by a copy certified under the seal of the country or sovereign, or by a recognition thereof in some public Act of the Governor-General of India in Council:

(5.) The proceedings of a municipal body in British India,

by a copy of such proceedings certified by the legal keeper thereof, or by a printed book purporting to be published by the authority of such body:

(6.) Public documents of any other class in a foreign country,

by the original, or by a copy certified by the legal keeper thereof, with a certificate under the seal of a notary public or of a British Consul or diplomatic agent, that the copy is duly certified by the officer having

the legal custody of the original, and upon proof of the character of the document according to the law of the foreign country.

#### PRESUMPTIONS AS TO DOCUMENTS.

79. The Court shall presume every document purporting to be a certificate, certified copy, or other document, which is by law declared to be admissible as evidence of any particular fact, and which purports to be duly certified, by any officer in British India, or by any officer in any Native State in alliance with Her Majesty, who is duly authorised thereto by the Governor-General in Council, to be genuine: Provided that such document is substantially in the form and purports to be executed in the manner directed by law in that behalf. The Court shall also presume that any officer, by whom any such document purports to be signed or certified, held, when he signed it, the official character which he claims in such paper.

80. Whenever any document is produced before any Court purporting to be a record or memorandum of the evidence or of any part of the evidence given by a witness in a judicial proceeding or before any officer authorised by law to take such evidence, or to be a statement or confession by any prisoner or accused person taken in accordance with law and purporting to be signed by any Judge or Magistrate or by any such officer as aforesaid, the Court shall presume—

that the document is genuine; that any statements, as to the circumstances under which it was taken, purporting to be made by the person signing it, are true, and that such evidence, statement or confession was duly taken.

81. The Court shall presume the genuineness of every document purporting to be the *London Gazette*, or the *Gazette of India*, or the Government Gazette of any Local Government, or of any colony, dependency or possession of the British Crown, or to be a newspaper or journal, or to be a copy of a private Act of Parliament printed by the Queen's Printer, and of every documents purporting to be a document directed by any law to be kept by any person, if such document is kept substantially in the form required by law and is produced from proper custody.

82. When any document is produced to any Court purporting to be

Presumption as to document admissible in England without proof of seal or signature.

a document which, by the law in force for the time being in England or Ireland, would be admissible in proof of any particular in any Court of Justice in England or Ireland without proof of the seal or stamp or signature authenticating it, or of the Judicial or official character claimed by the person by whom it purports to be signed, the Court shall presume that such seal, stamp or signature is genuine, and that the person signing it held, at the time when he signed it, the judicial or official character which he claims,

and the document shall be admissible for the same purpose for which it would be admissible in England or Ireland.

83. The Court shall presume that maps or plans purporting to be

Proof of maps made for purposes of any cause.

made by the authority of Government were so made, and are accurate; but maps or plans made for the purposes of any cause must be proved to be accurate.

84. The Court shall presume the genuineness of every book purporting to be printed or published

Presumption as to collections of laws and reports of decisions.

under the authority of the Government, of any country, and to contain any of the laws of that country,

and of every book purporting to contain reports of decisions of the Courts of such country.

85. The Court shall presume that every document purporting to be a

Presumption as to powers of attorney.

power of attorney, and to have been executed before, and authenticated by a notary public, or any Court, Judge, Magistrate, British Consul or Vice-Consul, or representative of Her Majesty or of the Government of India, was so executed and authenticated.

86. The Court may presume that any document purporting to be a

Presumption as to certified copies of foreign judicial records.

certified copy of any judicial record of any country, not forming part of Her Majesty's dominions is genuine and accurate, if the document purports to be certified in any manner which is certified by any representative of Her Majesty or of the Government of India resident in such country to be the

manner commonly in use in that country for the certification of copies of judicial records.

87. The Court may presume that any

Presumption as to books and maps.

book to which it may refer for information on matters of public or general interest, and that any published map or chart, the statements of which are relevant facts and which is produced for its inspection, was written and published by the person, and at the time and place, by whom or at which it purports to have been written or published.

88. The Court may presume that a mes-

Presumption as to photographs, machine-copies and telegraphic messages.

sage, forwarded from a telegraph office to the person to whom such message purports to be addressed, corresponds with a message delivered for transmission at the office from which the message purports to be sent; but the Court shall not make any presumption as to the person by whom such message was delivered for transmission.

89. The Court shall presume that every

Presumption as to due execution, &c., of documents not produced.

document, called for and not produced after notice to produce, was attested, stamped and executed in the manner required by law.

90. Where any document, purporting or

Documents thirty years old.

Documents thirty years old, is produced from any custody which the Court in the particular case considers proper, the Court may presume that the signature and every other part of such document which purports to be in the handwriting of any particular person is in that person's handwriting, and, in the case of a document executed or attested, that it was duly executed and attested by the persons by whom it purports to be executed and attested.

*Explanation.*—Documents are said to be in proper custody if they are in the place in which, and under the care of the person with whom, they would naturally be; but no custody is improper if it is proved to have had a legitimate origin, or if the circumstances of the particular case are such as to render such an origin probable.

This explanation applies also to section eighty-one.

*Illustrations.*

(a) A has been in possession of landed property for a long time. He produces from his custody deeds relating to the land showing his titles to it. The custody is proper.

28. If any Insurance Company makes default in making such return, turns to the Justices as are required by this Act, the said Company or Secretary or chief officer or manager thereof shall be liable to a penalty not exceeding fifty rupees for every day during which it is so in default.

29. The cost of all establishments and plant hired or purchased, and of all other charges under Part III. of this Act shall be paid from the fire-brigade fund. The full amount of such charges over and above the moneys which may accrue to the fire-brigade fund under Sections 25 and 26 of this Act, shall be contributed by the Justices, and by the Commissioners of the Suburbs, in the following proportions, namely,—by the Justices, seven-tenths; by the said Commissioners, three-tenths. At the end of each quarter of a year, the Justices shall certify to the said Commissioners the total cost of the fire-brigade for such year, the money which may have accrued under sections 25 and 26 of this Act, and the precise sum which must be paid by each body charged with the cost of the Calcutta fire-brigade under this Act. On the receipt of such certificate, the said Commissioners shall pay the sum certified against them by the Justices. Provided that in no case shall the three-tenths payable by the said Commissioners in any year after the first year of the establishment of the fire-brigade exceed the sum of ten thousand Rupees.

## PART V.

### MISCELLANEOUS.

30. It shall be lawful for the Lieutenant-Governor of Bengal, on the recommendation of the Justices passed by resolution, to declare that any other fibre or any commodity which is stored or deposited in warehouses besides jute or cotton shall be warehoused and kept subject to the provisions of Part II. of this Act. When such declaration shall have been made in the *Calcutta Gazette*, this Act shall be read as if the name or names of the said fibre or commodity had been printed in addition to the words "jute" or "cotton" in the

several Sections of Part II. wherein the said words "jute" or "cotton" may occur.

31. The Justices and Municipal Commissioners respectively shall <sup>Submission of re-ports.</sup> make a report to the Lieutenant-Governor as soon as conveniently may be after the 31st July next showing how the provisions of this Act have been carried out, and specifying the jute warehouses in respect of which licenses have been granted. Such reports shall be forthwith published in the *Calcutta Gazette*. And thereafter the Justices and Municipal Commissioners shall make a like report once a year at such time as the Lieutenant-Governor shall direct.

32. Any person committing any offence <sup>Power to arrest.</sup> in respect of which a penalty is provided by Section 14 or Section 24 of this Act may, if his name and address be unknown, be arrested by any officer to be by the Justices or the Municipal Commissioners within their respective jurisdictions thereunto appointed, and by such officer or any person by him thereunto authorized, or by any officer of police, forthwith conveyed before some Magistrate having jurisdiction in the place in which such offence shall have been committed, or shall be taken to the nearest police station within the said jurisdiction in order that such person may be detained until he can be brought before a Magistrate, or until he shall enter into recognizance with or without sureties, for his appearance before a Magistrate.

33. Whenever such person shall be taken <sup>Offenders to be brought to trial.</sup> to a police station, the officer in charge of such station shall, as soon as conveniently may be, cause him to be conveyed before some Magistrate having jurisdiction in the matter.

34. Whenever any person shall be charged with the commission of any offence under this Act before a Magistrate, such Magistrate may forthwith hear and summarily determine the charge of such offence. Any thing made punishable by this Act shall be deemed to be an offence within the meaning of the Indian Penal Code, and without the limits of the town of Calcutta, shall be dealt with, save as herein otherwise provided, under the provisions of Chapter XV of the Code of Criminal Procedure.

35. This Act so far as it relates to the Construction of town of Calcutta shall be read with, and taken as part of the said Act VI of 1863, and the subsequent Acts, amending the same; and so far as it relates to the suburbs of Calcutta, or to the Municipality of Howrah, it shall be read with and taken as part of Act III of 1864, passed by the Lieutenant-Governor of Bengal in Council, and of the subsequent Acts amending the same.

#### ACT No. III of 1872.

*An Act to amend the Calcutta Port Improvement Act, being Act V of 1870 passed by the Lieutenant-Governor of Bengal in Council, and to amend Act XXII of 1855.*

Passed on the 6th June, 1872.

WHEREAS it is expedient to give to the Commissioners for making improvements in the Port of Calcutta a like indemnity to that which is given to the East India Company by Section 61 of Act XXII of 1855, and otherwise to amend the said Act; It is hereby enacted as follows:—

1. The said Commissioners shall not be answerable for any act or default of any Conservator or Harbour Master of the said port, or of any Deputy or Assistant of the said officers, or of any person acting under the authority or directions of any such officer or assistant, heretofore or hereafter done within the limits of the said port; nor for any damage or injury heretofore or hereafter sustained by any vessel in consequence of any defect in any of the moorings, hawsers, or other thing belonging to the said Commissioners within the said port which may be used by such vessel. Provided that nothing in this Section shall protect the said Commissioners from an action in respect of any act done by or under the express order or sanction of the said Commissioners.

2. Section 23 of the said Act XXII of 1855 is hereby repealed so far as the same affects the Port of Calcutta, but such repeal shall not affect any act done or liability incurred under the said Section.

3. If any vessel with or without cargo shall be wrecked, stranded, or sunk within the limits of the said port, the Commissioners may in any case cause the same to be raised, removed, or destroyed; or they may call on the owner, master, or consignee thereof, to cause the same to be raised, removed, or destroyed; and if the said owner, master, or consignee, when called upon, shall refuse or neglect forthwith so to do, the Commissioners in that case also may cause the same to be raised, removed, or destroyed. Unless all expenses in or towards executing any works undertaken by the Commissioners under this Section shall be repaid within one month after the completion thereof, the Commissioners may recover the same in the manner provided by the next succeeding Section. The amount claimable and due under this Section shall include all monies expended reasonable remuneration for labor and for the use of the property and appliances of the Commissioners, and a further sum of twenty per cent. on the total amount so due in respect of monies expended and of remuneration. If any dispute shall arise concerning the amount due to the Commissioners under this Section, the same shall be determined by a Magistrate, who, upon application made to him for that purpose, shall have power to determine such amount, and to award such costs as he shall think reasonable to be added to or deducted from the amount due under this section as he shall direct; and whose decision shall be final.

4. If the property recovered under the next preceding Section is unclaimed, or if the person claiming the same refuses or neglects to pay the amount due to the Commissioners under the next preceding Section in respect thereof, such property, if of a perishable nature, may be sold forthwith, and if not of a perishable nature, may be detained by the Commissioners at the risk and expense of all parties interested therein, and may be sold at any period not less than two months after the recovery thereof by public auction, and after the realization of the proceeds thereof, the amount due to the Commissioners as aforesaid shall be deducted therefrom and paid to the Commissioners, and the balance shall be paid to the person entitled to recover on his applying for the

Commissioners may raise wreck, &c., and charge reasonable expenses.

Indemnity to Port Commissioners against default of officers, &c.

Sale of property if unclaimed, or if expenses unpaid.

Repeal of Section 23, Act XXII of 1855.



What I have to consider, then, is whether the Subordinate Judge acted under a mistake or misapprehension as to the law, when he held that the power of sale inserted in this mortgage-deed made it clearly unnecessary for the plaintiff to apply for a judicial order of sale.

With a single exception, to which I shall presently refer, I have not been able to find in the reported cases any decisions of the courts in India on the subject of a mortgagee's power to sell, without the intervention of a court, in cases not governed by English law. The English law is, of course, perfectly clear. Not only has the mortgagee the power to sell, without the concurrence of the mortgagor, in cases where such power is expressly given by the mortgage-deed, but by a recent statute such a power of sale is made incident to all mortgages, unless it be excluded or limited by the mortgage-deed.

The case above referred to is that of *Bhuvanee Churn Mitr v. Jykishen Mitr* (b). Although that case stands alone, it is a very valuable authority. It is stated in the judgment of the court to have been a novel and unprecedented case. "It may safely be affirmed," the Judges say, "that no such condition" (i. e., a power of sale given to the mortgagee) "is to be found in any document produced in the Company's Courts, since the Code of 1793 came into operation, between parties contracting in the Mofussil. If, then, respect be had to the universal impression throughout the country, and to the uniform practice of our courts, the presumption must be against the validity of such a stipulation." As it was the first case of the kind, so it appears to have been the last; and Mr. Macpherson, in his work on mortgages (p. 46), accepts the decision in it as settling the present state of the law in Bengal and the North West Provinces. The case was very fully argued, Sir J. W. Colville, then Advocate General, appearing in support of the sale made by the mortgagee under a power contained in the mortgage-deed; and the Judges unanimously held that such a power was repugnant to the spirit, if not to the letter, of the Regulations, and unsuited to the circumstances of this country.

Our Bombay Regulations, like those of Bengal, contain no provision regarding the

sale of a mortgaged estate under a power of sale; for Clause third of Section 15 of Regulation V. of 1827, referred to by the Subordinate Judge, has no real bearing on the question. If it has any such bearing, it seems to me to indicate rather that a civil suit is necessary, than that a mortgagee may sell the property without a suit. In the present case, as in the Bengal case, the point raised is a novel and unprecedented one. I do not remember ever to have seen a document executed between natives in the Mofussil in which such a condition was inserted, nor do I believe that such a power of sale has ever been exercised in the Mofussil, for if it had been exercised, the question would almost certainly have come before the courts.

I am strongly disposed to agree with the Calcutta Judges as to the impolicy of allowing sales by mortgages in the Mofussil. The mass of mortgages consists of mortgages of ancestral fields, made by ignorant cultivators to greedy and unscrupulous money-lenders. The great object of the money-lender is to get the land into his own hands, and, when he has succeeded, he is the worst possible landlord, spending nothing on the improvement of his estate, and rackrenting the unfortunate ryot whose proprietary rights have passed from him, but who is willing to slave for the usurer rather than abandon the field of his fathers. When we stand between two classes such as these, it is the borrower, and not the lender, whom we should protect. Any measure which tends to the general transfer of proprietary rights in land from the cultivating to the money-lending classes should, in my opinion, be viewed with the greatest jealousy. We have introduced into our system, to the great benefit of the ryot, the English doctrine of the equity of redemption; and I am happy to say that this court has determined to adhere to that doctrine, notwithstanding the attempts which have been made to wrest a recent decision of the Privy Council into a weapon for attacking it. But this would be of little use, if we were to allow mortgagees to sell the property, whenever they pleased, without the intervention of a Court of Justice. As the Calcutta Judges say: "This court has only to declare such a condition legal, and in the course of a short time not a mortgage-bond would be without it. The mortgagee would then sell his debtor's property to suit his

(b) Calc. S. D. A. 1847, p. 354.



own time, and in such manner and with such publicity and formalities as he thought proper. Fraud, it is to be feared, would frequently accompany the transfers, and the property fall into the hands of the mortgagee or some of his connections at an inadequate price, leaving the lender at liberty still to pursue the borrower for the balance that may remain after the sale." p. 364.

Of course it may be said that the system has been found to work well in England. That must be presumed to be so: for the courts, which were at first opposed to the introduction of such a system, have long since recognised its validity, and the Legislature has now gone so far as to annex a power of sale to contracts in which the contracting parties have not provided for it. But it does not follow that the system is suitable to other countries, or to this country in particular. The Code Napoleon (Articles 2078, 2090) absolutely excludes it, declaring any stipulation for a power of sale, to be exercised by a mortgagee otherwise than through the court, to be null and void. The nations of Continental Europe generally have, I believe, adopted the same rule (*see* Story of Bailments, Sec. 309), and a like rule is found in the Code of Louisiana. The notes of the Indian Law Commissioners on the first draft of the Penal Code sufficiently show in what high esteem the Louisiana Code is held by those who have been concerned in legislating for India.

The sale of a pledge by the creditor certainly does not appear to be opposed to the Hindú law. Mr. Colebrooke (*Digest*, Vol. I., p. 141,\* *Madras* ed., 1864) gives a text of Brihaspati: "When the debt is doubled by the interest, and the debtor is either dead or has absconded, the creditor may attach his pledge, or the debtor's chattel, and sell it before witnesses; or, having appraised it in an assembly of good men, he may keep it ten days, after which, having received the amount of his debt, he must relinquish the balance, if there be any. Having ascertained his own demand by the help of men skilled in arithmetic, and taken the attestation of witnesses, he commits no offence by thus recovering it." The very next text, however, points to the intervention of judicial authority in such matters: "When the pawn is missing, let the creditor produce

his pledge before the King; it may then be sold with his permission: this is a settled rule. Receiving the principal with interest, he must deposit the surplus with the King." This last text prescribes a process very similar to a decree, and sale under a decree of court; and, whatever texts may be found which may seem to authorise independent action of the creditor, it is certain that the usage of the country is opposed to it; and as a guide to our courts the usage of the country takes precedence of the Hindú law.

It is perhaps not necessary for the purposes of this suit to decide positively that a sale by a mortgagee, under a power contained in the mortgage-deed, would be void. That question is open to just so much doubt as to render legislation on the subject desirable; and I am glad to see that the Indian Law Commissioners in their sixth Report propose to legislate in the right direction, if I may venture so to say. The rules proposed by them oblige a mortgagee who desires a sale to obtain it through the agency of a Civil Court, and prevent him from buying the property himself at the court-sale without the leave of the court previously obtained. "We hope," say the Commissioners, "that the artful contrivances by which land is often acquired much under its value by means of the process of foreclosure may thus be checked, and that sales, being made openly under the supervision of the courts, will be fairly conducted." For the purposes of this suit it may be sufficient for me to say that, for the reasons which I have stated, it is extremely doubtful whether the plaintiff could have made a valid sale under the power contained in the mortgage-deed; that he would have been very ill-advised if he had attempted to exercise a power so novel and of such doubtful validity; and that even if it were not absolutely necessary for him to come into court, he showed a proper and wise discretion in so doing. It follows from this that he is entitled to his costs.

No doubt, if the defendant had shown that he had offered to join the plaintiff in making a conveyance of the property, and was ready to pay any balance which might be due, the plaintiff would fairly have been made to bear the costs. But the evidence on the record, even if reliable, does not prove this, or anything like this. It only shows that two persons who made an offer to buy the property were referred by the defendant to

the plaintiff. The sum offered was less than the sum due to the plaintiff, and the plaintiff would certainly not have been bound to part with his security, even if the defendant had joined in the conveyance, unless he thereby obtained full satisfaction of his debt.

I think that the plaintiff is also entitled to interest until the date on which his debt was satisfied, though, on the other hand, he is bound to give an account of the rents and profits up to the same date. The Subordinate Judge has taken the account correctly up to the date of the institution of the suit, so that it only remains to do the same for the period intervening between the date of the suit and the date of payment.

I would, therefore, amend the Subordinate Judge's decree, by ordering that an account be taken of the rents and profits of the mortgaged premises received by the plaintiff between the date of institution of the suit and the date on which the decree of the Subordinate Judge was satisfied; that the amount found to be owing on such last-mentioned account be deducted from what shall be found to be due to the said plaintiff on account of simple interest at six per cent. accruing due between the same dates; that the balance, if any, be paid to the plaintiff; and that if, on the contrary, the amount found to be owing to the defendant on such account of rents and profits be in excess of the sum found to be due to the plaintiff on account of interest, the amount in excess be paid to the defendant. I would also direct that the defendant bear all costs throughout. In other respects the decree of the Subordinate Judge should be confirmed.

KEMBALL, J. :—I quite concur in the order it is proposed to make on this appeal as to costs and interest; but as the ground on which my opinion is based, differs from that taken by my brother Melvill, and as I am unable to agree with him in thinking it to be a matter of great doubt whether the mortgagee could have made a valid sale under the power given him in the deed, it becomes necessary for me to make a few observations.

I agree in thinking that the lower court laboured under a mistaken apprehension of the law in holding that "the institution of this suit simply to enable the plaintiff to sell the house was quite uncalled for," and for

that reason saddling the plaintiff with all the costs of the suit; and that this, therefore, is one of those cases in which as regards costs we should entertain an appeal. It appears to me that the Subordinate Judge had misunderstood the rights and remedies of a mortgagee. It is a clear rule that a Court of Equity will not prevent a mortgagee from using all the remedies belonging to his character, and exercising all the powers that are given to him, as and when he pleases, even concurrently (2 Spence 634). A power of sale is only an additional remedy, and on that point—*vide* note e, 2 Spence 634—it was held that it does not interfere with the right of a mortgagee to foreclose. Consequently, it must be held that it was competent to the plaintiff in the present case to bring his action, and, that being so, following the usual rule in suits by mortgagees, he was entitled to his costs.

But assuming for the sake of argument that the only remedy left to the plaintiff under the terms of the mortgage was to sell the property on which his debt was secured, I must confess I see no objection, the ruling of the Bengal Sadr Court notwithstanding, to the exercise of such remedy. The introduction of a power of sale into mortgage-deeds in the Mofussil is, no doubt, to say the least, *unusual*, but I do not understand why on that account it should not be exercised; nor am I aware, whatever may be the law in the Bengal, that the exercise of such a power is in any way repugnant to either the letter or spirit of our Regulations, it being borne in mind that prior to the ruling in *Kámji v. Chinto* it had been invariably held in this Presidency, where there was an agreement that the right of redemption should be confined to a particular time, that on default made the property in the thing mortgaged passed absolutely. Moreover, I do not understand why the courts should interfere with arrangements fairly entered into between individuals for the purpose of avoiding expense and delay, merely because some possible injustice is dreaded. My own experience teaches me that the professional money-lenders neither desire nor seek to possess themselves of land; and where cases of oppression and fraud do arise, the courts are open to those aggrieved.

## Judicial Committee of the Privy Council.

*Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Roy Dhunput Sing vs. Madhomotee Dabia, from the High Court of Judicature at Fort William in Bengal; delivered 2nd May, 1872.*

*Present:*

Sir James W. Colville,  
Sir Montague E. Smith,  
And Sir Robert P. Collier.

Sir R. Palmer and Mr. Alex.

Mortimer instructed by

Mr. Mortimer, ... for Appellant.

Mr. J. D. Bell instructed by

Messrs. Watkins Lattey, ... for Respondent.

A petition which had been put in by mistake by the Judgment creditor for enforcement of his decree in a case in which no attachment had taken place was held to be a *bona fide* petition.

The fact that a petition is in the end abortive does not take from it, the character of a proceeding to enforce the decree.

The date, from which the three years within which proceedings should be taken in execution of a decree, ought to commence to run from the date when such petition is disposed of.

In this Appeal the only question which arises is, whether within three years preceding the application for execution made in the Court below any proceeding had been taken to keep the original decree in force; the question depending on the 20th section of Act XIV of 1859. The precise date of the original decree has not been stated, but that date is immaterial, because the question is whether there was any proceeding within three years preceding the application for execution which was made on the 24th April 1869; and undoubtedly it must be shown that within three years of that date some proceeding was taken to keep the original decree in force.

The first proceeding relied on is a former application or suit for execution, the petition in which bore date the 12th December 1865, under which there was an order for the sale of a putnee talook, which was to take place on the 26th February following. On the day of the sale, by agreement, an order was made for the postponement of the sale for two months, and upon that order being made, it was further ordered that the case be struck off the file. It was contended for the Appellant that this execution suit

must be considered to have continued in living force; although by the suspensory order no proceedings were to be taken by way of sale for two months, and that the three years did not commence to run until the end of these two months. Their Lordships do not think it necessary to decide that question; they desire to give no opinion judicially upon it; having come to the clear opinion that the proceedings which were founded by the subsequent petition of the 20th March 1866, are sufficient to take the case out of the operation of the limitation.

The petition of the 20th March 1866, which was filed before the above-mentioned period of two months had expired, after referring to the decree, and to the execution and the postponement of the sale, alleges that the judgment-debtor had subsequently taken out a decree against a debtor of his own, and sued out execution, and caused some property to be sold, and that the purchase-money, an amount of Rs. 551, was received on deposit, and then the petitioner proceeds, "While my execution was pending I caused that amount belonging to the judgment-debtor to be attached and file this petition, and pray that my execution suit may be restored to the file, and that the aforesaid attached amount, Rs. 551, be paid to my mookhtar."

This petition, if *bona fide*, would clearly be a proceeding to enforce the judgment; its object being to obtain execution of the money attached. It was referred to the officer of the Court, and the officer upon that reference found that no moneys were attached in execution of the decree in which the petition was filed, that is the decree in the present suit, but that certain moneys had been attached in another suit between the Appellant and the Respondent. The report is dated on the 3rd of May. On the 12th of May an order of the Court is made upon it, which has the following preamble: "Whereas no money has been attached no orders can be passed for the payment of such money, nor can other steps be taken. It is accordingly ordered that the case be struck off this file and the mookhtarnama be returned." It seems to result from the report of the officer of the Court, and the order made upon that report, that no execution could issue upon the petition in consequence of the money not having been attached in

this suit, and that there was another suit between the same parties, in which that sum of money had been attached.

It is said that this proceeding cannot be held to be one to keep the judgment in force, because it was a petition to obtain execution of a sum of money which it was not possible that the execution could reach, and that that must have been so to the knowledge of the decree-holder. It seems to their Lordships that these circumstances really affect only the *bond fides* of the proceeding. If their Lordships could infer from these facts that the petition was a colourable one, not really with a view to obtain the money if they could come to that conclusion, in point of fact, the proceeding would not be one contemplated by the Statute; but their Lordships cannot come to that conclusion. It appears that the decree-holder really desired to obtain execution of this money, and the fair inference is that he had mistaken the suit in which he could apply for execution, and having the attachment in another suit, he, by mistake, applied for execution in the present one, in which he had not obtained the previous attachment which is necessary to ground execution.

Then, assuming it to be a *bond fide* proceeding, which failed in consequence of that mistake, their Lordships think that the original petition was a proceeding to enforce the judgment, and to have execution of it; that it was a continuing proceeding duly prosecuted by the Appellant, up to the time of the report, and further up to the time when the judgment was finally given; and that during the whole of such pendency the decree-holder must be considered as going on with one and the same proceeding. Their Lordships do not consider that the fact that it was in the end, abortive, takes from it the character of a proceeding to enforce the decree. The consequence will be that the 12th May 1866, when the petition was dismissed, is the date from which the three years ought to commence to run. This decision is entirely in accordance with the judgment of this Committee in the case of Maharajah Dheraj Chund Bahadoor and Bulram Singh, and does not conflict with any case to which their Lordships have been referred.

The result is that their Lordships will humbly advise Her Majesty to allow this

Appeal and to order that the judgment under appeal be reversed, and that in lieu thereof the Appeal to the High Court be dismissed, and the judgment of the first judge be affirmed, with costs. The Appellant will have the costs of this Appeal.

## Judicial Committee of the Privy Council.

### BADSHAPORE SUIT.

*Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeals of Forester and others vs. the Secretary of State for India (Badshapore Suit and Arms Suit) from the Chief Court of the Punjab; delivered 11th May, 1872.*

Present:

LORD CHANCELLOR, LORD WESTBURY, Sir JAMES W. COLVILLE, Sir JOHN STUART, Sir MONTAGUE SMITH, and Sir LAWRENCE PEELE.

The status of the Begum Sumroo both before and after the acquisition by the East India Company of the Doab and the territories on the West of the Jumna comprised in the treaty of peace concluded with Dowlat Rao Scindia on 30th December 1803, —judicially considered. So-called "Political plea" put forward by Defendant over-ruled.

In this suit the representatives of the late Mr. Dyce Sombre claim to recover from the Government of India possession of a valuable estate called Pergunnah Badshapore, Jharsa, with mesne profits since August, 1836. They do not claim merely a zemindary interest in the lands. They claim to hold them rent free; that is, free from assessment to Government revenue. And the total value of the claim is assessed in round numbers at a sum little short of a quarter of a million sterling.

The defence to this suit, on the part of the Government of India, is twofold. It is alleged, first, that, on the death of the Begum Sumroo, in 1836, the estate, whatever were the nature and extent of her interest therein, was resumed by an Act of Government which, having regard to the status of the Begum as an independent, or quasi-independent sovereign, was an act of State, the propriety and validity whereof are not cognisable by any municipal court. And in support of this proposition they rely on the case of the Rajah of Tanjore, reported in

7th Moore, 476, and similar authorities. It is further alleged that, if the case is cognisable by the municipal courts, the appellants have failed to establish by trustworthy evidence the title to this state on a rent-free tenure (capable of passing Mr. Dyce Sombre by the deed of gift, or subsequent will of the Begum Sumroo).

In order to test the sufficiency of the first defence, it is necessary to come to a clear conclusion touching the status of the Begum Sumroo both before and after the acquisition by the East India Company of the Doab and the territories on the west of the Jumna, comprised in the treaty of peace concluded with Dowlut Rao Scindia, on the 30th December, 1803.

It will be convenient to consider the question with reference to the Begum's possessions at Sirdhana and elsewhere within the Doab; because the negotiations and correspondence with her were, up to the time of the final agreement or treaty with her in 1805, confined to those possessions; no mention being made therein of Badshapore, which is on the western side of the Jumna; and because the acts and powers of the Government in the resumption of Badshapore cannot be put upon higher ground than their acts and powers in the resumption of Sirdhana.

The status of the Begum, in respect of her Doab possessions before 1803, is admitted to have been that of a Jaghiredar, holding upon a Jaidad tenure, i. e., upon a grant of a certain district together with the public revenues of it, on the condition of keeping up a body of troops, to be employed when called upon in the service of the sovereign of whom the Jaghire was held. The *de facto* Sovereign of the Doab at this time was Dowlut Rao Scindia. There is nothing in the record to show what powers over the inhabitants of the district included in such a Jaghire were, as incident to the tenure, vested in the Jaghiredar. But it cannot be doubted that, practically, the whole administration of the territory included in her Jaghire, whether civil or criminal, was vested in the Begum, who exercised a sort of delegated sovereignty therein.

This being the condition of the Begum in the early part of 1803, Lord Wellesley, in pursuance of the policy by which he succeeded in detaching certain French adventurers from

the service of Scindia, appears to have entered into negotiations with her before the actual commencement of hostilities with the Mahratta prince. War, though previously certain, was not declared until August 1803, and Lord Lake's force broke up from Cawnpore on the 7th of that month. But the earliest letter from Lord Wellesley to the Begum that is set forth in the Record (p. 37) is dated the 20th of May; that letter shows that a previous correspondence had taken place between them, having for its object the diversion of the Begum and her battalions from the service of Scindia to that of the English. The negotiation so begun was continued throughout the war. Though this negotiation may not have prevented such of the Begum's troops as were actually with Scindia under her Lieutenant-Colonel Saleur, from fighting against us at the battle of Assaye, yet it kept her friendly to us in her own district. Nor can it be doubted that, at the time when peace was concluded, and by the treaty of the 30th December, 1803, the sovereignty over the Doab and the territories west of the Jumna, in which Badshapore is situate, passed from Scindia to the East India Company; the Governor-General had fully determined that the future relations of the Begum and the Company, though not as yet precisely defined, were to be friendly, and that our rights of conquest were not to be exercised to her prejudice. This appears from Lord Wellesley's letter to Lord Lake, of the 23rd of December, 1803 (Appendix, p. 60), which admits that the Government could not in fairness establish British authority, or introduce British law into the territory composing the Begum's Doab Jaghire; and the nature of the equivalent proposed, in the event of her agreeing to exchange those possessions, is also a circumstance which has some bearing upon the present question. It appears for some time to have been in Lord Wellesley's contemplation to make the Jumna the western boundary of the purely British territory, and to form the territories conquered from Scindia on the western bank of that river into independent and protected principalities. And it being then considered desirable to remove the Begum out of the Doab, it was proposed to give her one of these principalities, reconciling her to the inconveniences of the exchange by the accession of dignity implied in treating her as a sovereign under the pro-

tection of the British Government. This seems to be the fair construction of Lord Lake's letter of the 23rd November, 1803, to the Governor-General, and of all that was done upon it. This negotiation was continued (see Letters, p. 61) after the ratification of the treaty of 30th December, 1803, and when the sovereignty of the East India Company in the territories ceded by that treaty had become complete. The project, however, was ultimately abandoned by Lord Cornwallis; and the final treaty or agreement with the Begum was made in August, 1805. (Appendix, p. 41, No. 42.) The substance of that agreement is that, "Those places in the Doab which have formed the Jaidads of Zeboolnissa Begum shall remain to her (as before) from the Company as long as she may live." What follows may either be the expression of conditions *quæ tacite insunt* in a Jaidad tenure, on conditions superadded thereto.

But the fair construction of the instrument and of the correspondence which led up to it seems to be that the Begum was for her life to hold her territories in the Doab from the Company as she had held them under Scindia; and that, as she was not a sovereign princess, but a mere Jaidadar under Scindia, she was to remain such under the Company, the project of conferring upon her the new dignity of a sovereign princess having been only part of the larger project for an exchange of territory, and abandoned with it. Up to this time there is little, if any, express mention of Badshapore. It is, however, admitted on both sides that the Begum was *de facto* in possession of it when the session of 1803 took place, and that she continued during her life to hold it, and to exercise therein the same powers of government and administration which she exercised at Sirdhana.

This view of the status of the Begum is confirmed by the 9th paragraph of Lord Metcalfe's letter of the 4th May, 1836 (see Record in Arm's Suit, p. 66). The authority upon such a subject of a man of his experience and character is of the highest value. This being so, the present case is distinguishable from that of Kamachee Boye Sahaba in the 7th Moore, I. A. There the Rajah of Tanjore, though he may have had less substantial power than that exercised by the Begum Sumroo, retained at least the shadow of original and independent sovereignty. Lord Kingsdown thus puts the

question:—"What was the real character of the act done in this case? Was it a seizure by arbitrary power on behalf of the Crown of Great Britain on the dominions and property of a neighbouring state, an act not affecting to justify itself on grounds of municipal law? or was it, in whole or in part, a possession taken by the Crown under colour of legal title of the property of the late Rajah of Tanjore in trust for those who, by law, might be entitled to it on the death of the last possessor. If it were the latter, the defence set up has no foundation." The act of Government in this case was not the seizure by arbitrary power of territories which up to that time had belonged to another sovereign state; it was the resumption of lands previously held from the Government under a particular tenure, upon the alleged determination of that tenure. The possession was taken under colour of a legal title; that title being the undoubted right of the sovereign power to resume, and retain or assess to the public revenue all lands within its territories upon the determination of the tenure, under which they may have been exceptionally held rent free. If by means of the continuance of the tenure or for other cause, a right be claimed in derogation of this title of the Government, that claim, like any other arising between the Government and its subjects would *prima facie* be cognizable by the municipal courts of India.

The particular case was, no doubt, somewhat complicated by the peculiar nature of the powers exercised by the Begum in her Jaghires; and the practical exclusion of her territories during her lifetime from the operation of British law and the jurisdiction of courts.

Their lordships think that the regulations, which were the written law of that part of British India, and whatever else may be held to constitute British law, were not introduced into these territories by Regulation VIII of 1805, or until after the passing of Act XVII of 1836. The Begum's territories were treated as excepted from the conquered territories; and although the sovereign rights of Scindia over these territories passed under the treaty of 1803, they passed, subject to the rights of the Begum, the precise definition whereof was then the subject of the negotiations which resulted in the agreement of 1805. Accordingly, on the Begum's death, it was thought necessary to pass an Act of



the legislature in order to legalise the introduction of regulation law into these territories by order of the Governor-General. That this was done by legislation, and not by proclamation, affords, perhaps, another argument against treating the annexation of these territories as an act of conquest or arbitrary power, or as the exercise of an original right of conquest which had remained in suspense during the Begum's lifetime. It is probable, however, that the abnormal condition of these territories was one reason why the resumption took place, not as it would have taken place in a province or district wherein the action of Government is fettered by the regulations, by a resumption suit, but in what is called the political department; and thus both parties seem, for some time at least, to have considered that the act was in the nature of an act of State. For it is to be observed that Mr. Dyce Sombre himself asserted his supposed rights by memorials and appeals to one political authority after another, beginning with the Lieutenant-Governor of the North-West Provinces, and ending with the Prime Minister; and that it was not until after his lunacy and the order of Lord Chancellor Lyndhurst in that matter, that any recourse to the municipal courts was had, or apparently even contemplated. These considerations, however, though they may explain much of what appears from the record to have taken place, cannot affect the determination of the question under consideration. They cannot alter the legal nature of the acts of Government, or make the resumption, under the assertion of a legal title, of lands claimed adversely by a subject, an arbitrary act of sovereign power against an independent state. And even if the state of the law in the territories in question at the time when the act of resumption took place gave—as perhaps it did—a larger power of resumption to the East India Company than it possessed in the regulation provinces, that circumstance would not exclude the jurisdiction of the courts. For these reasons their lordships are of opinion that the first ground of defence, being that on which the courts below have mainly proceeded, fails. This being so, it is next to be considered whether the appellants have established their title to Badshapore Jharsi as held in perpetuity by a rent-free tenure; in other words, whether they have proved a grant by the sovereign power of the rent of the lands,

which rent would otherwise be payable to the State.

The original suit having been brought in 1848, to recover the estate from the East India Company, which had been in possession since 1836, the burden of proving a title sufficient to disturb that possession necessarily lies upon the appellants. This, however, would not have been otherwise had the commencement of the litigation been in 1836, and by proceedings in an ordinary resumption suit. For the regulations touching such suits cast upon the person who claims to hold land lakhiraj, or free from assessment to Government revenue, the burden of establishing a title recognised by law as sufficient to give that exceptional immunity, and require very stringent proof in such cases.

Regulation II, of 1819, which the appellants, in their original pleading at p. 8, invoke as one of those by which the claims of Mr. Dyce Sombre ought to have been determined in 1836, by its 28th Section provides, that an ancient sunnd shall not be treated as sufficient proof of its contents on the faith of its seal, or without confirmatory evidence. And Section 3 of Regulation XIV, of 1825, also shows the high degree of proof required. Nor are such provisions unreasonable, since every grant of this kind implies a perpetual alienation in favour of some individual, and his heirs, of a portion of the land revenue (the impost, if impost it is to be called, which immemorial custom has made the most natural and tolerable to the natives of India), and thus operates not only in derogation of the rights of future Governments, but to the injury of the subject, on whom the incidence of taxation for the necessary purposes of Government will be the heavier, in proportion as the public revenue is wasted by such alienations.

It is of the utmost importance in a case like the present to observe in what manner and upon what proofs the case of any claimant is first advanced. In the plaint filed in August 1848 by the committee of Mr. Dyce Sombre, it was stated generally and without condescending on the name of the grantee, that the Altumgha Jaghire Badshapore Jharsi was originally granted by the Emperor Shah Allum, and subsequently confirmed by Madho Rao Scindia. But in the substituted plaint, which was filed in January

1864 by the appellants, and must be taken to be the foundation of the existing suit, the statement is more specific. It is this:— "The Pergunnah of Jharsa, inclusive of Badshapore, was granted as an Altumgha Jaghire to the Begum Sombre (or Sumroo) by his late Majesty Shah Allum, in the 30th year of the ascension, and this grant according to the sunnud, dated the 2nd Zuffur, the 37th year of the ascension, was confirmed by the Maharajah Madho Rao Scindia." And the 4th, 5th, and 6th of the issues settled in the cause upon which the parties went to trial were, whether the Pergunnah of Badshapore Jharsa was granted by the Shah Allum to the Begum Sumroo, as mentioned in the plaint? Whether, if it were so granted, Shah Allum, at the time of such grant, possessed and exercised supreme power within the territory in which the lands were situated? And whether, if the same were granted, the grant was confirmed by Madho Rao Scindia, as in the plaint mentioned?

It will be convenient here to state the history and character of the alleged grant from Shah Allum as disclosed by the documents upon which the appellants mainly rely, viz., the papers procured from Delhi.

The case which the counsel for the appellant make on these documents is, 1st, that in the month of Shuwal in the thirtieth year of Shah Allum, the Begum presented a petition, praying that a new and complete Altumgha sunnud of Pergunnah Jharsa might be granted to her in substitution for one previously granted to Zuffur Yaub Khan, the son of Sombre or Sumroo; 2ndly, that a report was made, recapitulating the prior devolution of the estate, showing that it had been held by certain great officers of the court of Delhi in succession, as part of their respective Jaghires that it had for some time "continued released" as Jaidad of the battalion of Sumroo Bahadoor Feringee; and on the 15th of Rujub of that year (with the exception of certain villages) had been granted in Altumgha to Zuffur Yaub Khan on a representation that an Altumgha sunnud under the seal of Maharajah Puttail (said in one part of the record to be a title of Scindia) had been lost; 3rdly, that on this report and on the 19th of Shuwal the king issued a firman to the effect that an Altumgha grant of Badshapore Jharsa, with the exception of the villages excepted from the grant to Zuffur Yaub Khan, should be made to the Begum in

the terms therein expressed; 4thly, that whether the formal grant sunnud was or was not issued to her in pursuance of that firman, she two months afterwards presented another petition, in which she made no reference to the preceding grant to Zuffur Yaub Khan, but stated that all the estate, including the excepted villages, had, since the death of Sumroo, been in her possession as Jaidad; and that in consequence of that petition a sunnud of the whole estate, including the villages before excepted, was granted to her in Altumgha under the Khas' seal and Golden Togra of the Emperor on the 9th of Zilhij in the thirtieth year of his reign.

If these facts are true it follows that until the month of Shawul, or that of Zilhij, in the thirtieth year of Shah Allum, whatever interest the Begum had in Badshapore was in the nature of a Jaidad tenure; that Zuffur Yaub Khan never had an Altumgha grant of that estate under a sunnud of the Emperor except for a period of, at most, three months, and that, so far as appears, he was never in possession under that grant.

The original documents, of which the foregoing is the effect, were not produced, and the copies or alleged copies produced in evidence are admitted to have had no existence before 1847. They are said to have been copied from old records at Delhi at the instance of the committee of Mr. Dyce Sombre, or his legal advisers, with a view to the proceedings commenced in the following year. If the transactions which they represent to have taken place, really took place, an original sunnud, in the terms of what in the record at page 32 is called "sunnud No. 3," must have been issued to the Begum Sumroo under the seal of Shah Allum. But of this original sunnud there is no trace. It is not produced; its loss is not accounted for. There is no evidence that anybody ever saw it.

It has been strongly argued for the Government that the non-production of the original not being accounted for, secondary evidence of its contents is not admissible. Their lordships are by no means prepared to say that an Indian judge would not do right, according to the practice of the courts of that country, in rejecting a copy, if the absence of the original were not satisfactorily accounted for. There seems to be no reason for assuming that a rule requiring the best



evidence producible to be produced, has no application to courts of which the judges may be presumed to be, for want of professional training, less capable than they are elsewhere of weighing the effect of evidence. This committee undoubtedly enforced the rule in the case of Syud Abbas Ali Khan, 3 Moore's I. A., p. 156. There have, however, been other cases in which their lordships have declined to apply to Indian cases the strict rules of evidence which obtain in this country on trials *à nisi prius*. And, considering that in this case the judge of First instance has commented on the copies in question, their lordships propose to treat them as admitted in point of fact, and to consider what credit and effect ought to be given to them. Nevertheless, in weighing the whole evidence given in support of the appellants' title, the absence of proof that the original sunnud once existed, and was subsequently lost or destroyed, is a very grave circumstance, which cannot be excluded from consideration.

The case as to the copies of the sunnud, put forward by the learned counsel for the appellants, is, that they are proved to be copies taken from ancient documents at Delhi, since destroyed in the mutiny, which, whilst they existed, were public records, and of the same value as a duplicate original of the missing sunnuds.

But what is the evidence as to these papers? The proof of the most important of them, that called sunnud No. 3, depends on the testimony of the witness, Balmokund, given in 1865, and set forth at p. 54 of this record. He has deposed that, in 1847, he was ordered by the then peshkar of the King of Delhi to make the copy in question from an old paper which the latter took out of a cloth. The words of the witness are, "It was out of a dozen or so of the papers of the former times which had 'escaped,' and had been tied up by him in his 'busta,' or record cloth." He goes on to say, "There had been countless papers in the charge of his (the peshkar's) forefathers; many of them had doubtless been destroyed by insects, or perished in other ways. By 'escaped,' I mean those old papers or records which had come down from his forefathers into his actual possession." In answer to the inquiry, what had become of the paper from which he made the copy, he said, "The peshkar died in 1850, and all trace of his documents has disappeared," and

added, that the different servants of the king had each in their possession a few pounds' weight of documents, that had been handed down from father to son, besides those relating to their own time. He had previously said when asked whether he lived in the peshkar's house, "No; I went there for business, after the taking of Delhi by the British" (which words as the peshkar died in 1850, must be taken to refer to the original introduction of British authority in Delhi, rather than to the taking of the city in 1857), "the 'duftur' (registry office) of the king hardly existed."

Hence it appears that the paper from which the copy is said to have been made was anything but a record regularly kept and preserved, which afterwards perished in the storming of Delhi, if full credit be given to the witness and to his means of knowledge. It came to the peshkar with a few pounds' weight of other documents, was accidentally preserved when many others perished, and disappeared with him. Their lordships cannot treat such a paper as having the validity of an authentic record, the value of which depends on its custody in an authorised registry by a responsible officer. The evidence of Chujo Singh, as to the other and less important paper (No. 4), is of the same character.

An attempt was made to cast further suspicion on these copies and the transactions which they are produced to prove by the dates. It is contended on the part of the respondents that the months of Shawul, and Zilhij, of the 30th year of Shah Allum, fall within the autumn of 1788, when he was a helpless prisoner in the hands of Gholam Khadir, the Rohilla, who put out his eyes. On the other hand, the appellants assert that the date in question corresponds with the autumn of 1789. There is much that may be urged to support the respondents' contention. It seems to be certain that Shah Allum's reign, notwithstanding a short interregnum, was calculated from the death of his father Alamgir II., which Mr. Elphinstone and the best historians fix in November 1759, corresponding with Rabi II., A. H. 1173. It follows that the "jalus" or accession of Shah Allum is correctly fixed by Mr. Prinsep in his tables as 1 Jumadi I., A. H. 1173; and if the 30th year of that Prince's reign is to be calculated in the ordinary way from that date, it would begin on the 1 Jumadi I., A. H. 1202, and end with

the 1 Jumadi I., A. H. 1203. The months of Shuwal and Zilhij of the 30th year would then fall within 1203, and correspond with the autumn months of 1788. On the other hand, the appellants have referred to some coins and seals, from which it would appear that the 30th year of Shah Allum's reign was treated as identical with A. H. 1203; and from this and a passage in Mr. Seton's letter, afterwards referred to, they have argued that the dates in question must be taken to correspond with the autumn months of 1789. This view may perhaps be capable of being reconciled with the date of Shah Allum's accession by some peculiar mode of calculating the jalus year; and their lordships would be sorry to make their decision turn in any way upon a disputed point of Indian chronology. They may observe, however, that even if the dates in question are taken to fall within the year 1789, there is reason to doubt whether Shah Allum was at that time in a condition effectually to alienate any part of the revenues of the territories within which Badshapore is situated; at least without the concurrence of Scindia; and that there is no suggestion that the alleged grant received the sanction of the Mahratta power until 1795.

Their lordships, considering the nature of the documents under consideration, the testimony by which they are supported, have come to the conclusion that the appellants have not given evidence which can be accepted as sufficient proof of a grant, of which the original is neither forthcoming nor accounted for, unless the presumption of its existence can be assisted by the other evidence in the cause.

The corroboration chiefly insisted upon was of this kind. It was argued that copies of certain sunnuds, showing his title to Badshapore, were proved to have been sent by Mr. Dyce Sombre in 1836 to the officers of Government; that these were not shown to have been returned by the Government, and have not been produced by them in this suit; that they must therefore be assumed to have been identical; or, at all events, not inconsistent with the documents subsequently procured from Delhi. It was further insisted that, inasmuch as Government did not question the genuineness of these sunnuds in 1836, they must be taken to have been then satisfied of their authenticity. This argument is confined to the copies of sunnuds

supposed to have been sent by Mr. Dyce Sombre after the Begum's death. It is hardly pretended that the Government ever received from her any document of title except a copy of Scindia's perwannah. The sunnuds sent to Mr. Fraser, whatever they may have been, were returned by her messenger. Mr. Forsyth, on the other hand, argued strongly that Government was not shown to have received from Mr. Dyce Sombre copies of any documents corresponding with those now relied upon; or, indeed, the copy of any document of title except Scindia's perwannah. The evidence on the point is as follows:—Mr. Dyce Sombre, writing in the beginning of March, 1836, to Mr. Hamilton, says: "I beg to say I have already forwarded to you the copies of the sunnuds by which her late highness held her Jaidad, and the pergunnah of Badshapore in Altumgha, assigned to her by the former rulers of Hindoostan, being antecedent to the British sway of this adjoining district." These words would be grammatically accurate, if nothing relating to Badshapore but a copy of Scindia's perwannah, previously called by the Begum, in her letter of 1832, a sunnud had been sent. And Mr. Hamilton writing to Mr. Hutchinson (page 116) says:—"I also annex a copy of the sunnud referring to Badshapore having in the preceding sentence spoken of the sunnuds relating to Sirdhana." The argument that he would not have applied the word sunnud to the perwannah does not appear conclusive. Their lordships can give no credit to the alleged copy of the letter set out at p. 29. It was hardly pressed by Sir Roundell Palmer in reply. But Mr. Hamilton's letters of the 20th May, 1836, (page 169), and of December, 1836, (page 121), have been strongly relied upon by the appellants. They were written by him as collector of Meerut, with the object of having applied to the back rents of Sirdhana, which was within his jurisdiction, a more stringent rule than that which his superiors were disposed to apply either to Sirdhana or to Badshapore (with which he had no official connection). He draws a distinction between the two tenures; treating Sirdhana as Jaidad, and Badshapore, whether resumable or not, as the Begum's personal Jaghire. That this was the nature of the Begum's claim would perhaps appear from the copy of Scindia's perwannah; but it must be admitted that these letters are, on the whole, more consis-

tent with the appellants than with the respondents' theory, concerning the number and nature of the documents sent by Mr. Dyce Sombre.

One great and unexplained difficulty, however, touching the copies of sunnuds, supposed to have been sent by Mr. Dyce Sombre is this:—From what were these copies made? If from originals, where are the originals? If from other copies (and it was admitted at the bar that he must be presumed to have retained copies of whatever he sent), what became of those copies? Mr. Dyce Sombre was in correspondence with the home authorities touching his claim, up to 1842 (page 4). He was presumably then in possession of all the documentary proof he ever had of his title. He was found a lunatic on the 30th of July, 1843, and Mr. Larkins was appointed his committee in 1844. There was a faint suggestion at the bar that his documents of title were lost or destroyed during his lunacy. But there is not the slightest proof of this; and the non-production of any such documents in the suit affords grounds for supposing that neither Mr. Dyce Sombre, between 1836 and 1842, nor Mr. Larkins, when he took the advice of counsel in 1847, had any copies of the alleged sunnuds from Shah Allum; and, if so, it seems difficult to fix the Government with clear notice in 1836 of the previous title now sought to be established by the copies procured from Delhi in 1847.

Their lordships are of opinion that even if the Government were fixed with the notice of the claim of such title, it is not to be inferred that, because they did not then dispute, they admitted its genuineness. It is clear from all the proceedings that they did not profess to investigate the title. Their position throughout was that the tenure was, either in its nature, or by arrangement, resumable on the Begum's death, and they resumed it when that event happened.

The appellants' case, however, presents still graver difficulties. When a doubtful title is in dispute the first question that suggests itself is—when was it first asserted? and has it been continuously and consistently asserted? In the present case it is clear that this particular title was never asserted by the Begum in her lifetime, but that, on the contrary, she repeatedly asserted a different one, and acted in a manner wholly inconsistent with the presumption of its having

existed. The following is the short summary of the correspondence of the Begum in her lifetime with the Government touching Badshapore.

The first mention of any special title to the *pergunnah* is to be found in the printed correspondence in Mr. Setou's letter of the 24th February, 1808, when he complains of the attempt of the Begum on the 25th of November, 1807, to obtain from the King of Delhi a new *firman*, granting this *pergunnah* as an *Enam Altumgha* to Mr. George Dyce, (the father of Mr. Dyce Sombre) and his descendants. Mr. Setou's statement as to the property is, that it was bestowed as a *Jaghire* (which may be a more estate for life) by Shah Allum in the thirtieth year of his reign, which he treats, as corresponding to 1789, A. D., upon Zuffer Yaub Khan; that the Begum had obtained possession of it in that person's lifetime, and retained such possession after his death; and had now obtained a new *firman* bestowing *pergunnah* *Jharsa* and the town of Badshapore, formerly the *Jaghire* of Juffer Yaub Khan, as an *Altumgha* upon Mr. George Dyce and his descendants.

The Government of the day objected to this proceeding; insisted that Badshapore, like the Begum's possessions in the Doab, would revert to the East India Company on her death, and was obviously determined not to recognise as valid any grants of that nature which might be made at that date by the King of Delhi; but recommended that, in deference to the king and to her, she should be induced by friendly negotiations to give up the now sunnud. The negotiations for this purpose went on till 1811, when the Begum did give up the new sunnud. But the important fact in this transaction is, that the case she then put forward (see her letter of the 16th February, 1811, p. 83) was the following:—"I had, as I still retain, a firm conviction in my own mind that the *pergunnah* of Badshapore, and the villages of Bhijapoor and Bhudpore, were held as *Altumgha* to my late son, and would consequently revert to my adopted son, George Alexander David Dyce, in virtue of his marriage with my granddaughter." On this subject doubts have arisen respecting the nature of the grant, which is not now to be found in the family records. I consequently cannot urge a positive right, but," &c.

This letter contains most important admissions, which are utterly fatal to the title

set up in the amended plaint. It shows that at that time no grant could be found; furthermore, it asserts "the firm conviction" in the Begum's mind that Badshapore was held as Altumgha to her late son, but that, in consequence of doubts respecting the nature of the grant which could not be found in the family records, she could not urge "a positive right." Now, it is inconceivable that if she had obtained a grant to herself from Shah Allum, she should not, at this date (1811) have remembered it, and remembering it, should not have put it forward; and if such a grant ever had existence, and could not then be found among her family records, what reason can be suggested why she should not then have applied to the Registry of the King at Delhi for a copy of it?

In 1825, after an interval of fourteen years, she proposed to surrender the Jaghires held by her, including Badshapore, a proposal which was never carried into effect. She seems to have then made no statement of her title, but the representation of Colonel Dyce, with whom she was then on bad terms, was that the sunnud on which the Jaghire was held, whatever its effect, was in favour of Zuffur Yaub Khan. Had the Begum at that time been in possession of sunnuds in her own favour, superseding the grant to Zuffur Yaub Khan, she would hardly have failed to produce them.

In 1831 she first expressed a desire that her Jaghires should be assigned to Mr. Dyce Sombre, whom she designates as her adopted son and intended heir. In her letter to Government she speaks of Badshapore and its dependent villages as property "which the deceased Nawab, his grandfather, was possessed of on Altumgha tenure." The Government, as before, appears to have refused its assent to the alienation after her death of any of the lands held by her rent-free; treating the whole as revertible to Government after her death. Some time in 1832 as it is supposed, she made a further application to Government, by the letter of which the substance is set forth at p. 180 of the Record. This letter is the only one which can be taken to contain the assertion of an Altumgha title to Badshapore in herself. She speaks of the estate as "my Altumgha," and forwards with some other documents a copy of Scindia's *perwannah*, but even in this letter, when combating the supposed

objection of Government that Badshapore was included in the arrangement made with her, through Mr. Guthrie, she says:—"I beg to observe that the country of the Doab only is mentioned in it (Mr. Guthrie's letter); while the *pergunnah* of Badshapore *alias* Jharsa, my Altumgha, and the gardens, &c., were bestowed on Nawab Zuffur Khan, the maternal grandfather of Mr. Dyce, for his expenses." This sentence would imply that the title was that of Zuffur Yaub Khan, though the *de facto* possession was hers.

In March 1833, she again renewed the attempt to get the Government to consent to the transmission of this estate to Mr. Dyce Sombre. The Government again refused to give its consent, treating the estate as held on a life tenure only. But on this occasion the Begum once more clearly (see p. 184) rested her claim upon an alleged Altumgha grant to Nawab Zuffur Yaub Khan; and referred to sunnuds importing such a grant as being in her possession. There was not on this occasion the slightest suggestion of a grant in her own favour.

The discussions, therefore, between the Government and the Begum touching Badshapore and the tenure on which it was held, cover a period from 1808 to 1833. The Government throughout that period insisted that her interest was limited to her life, and that on her death the estate would revert to the State. The Begum, on three or four several occasions, at considerable intervals of time, contended that the tenure was Altumgha; sometimes appealed to the Government to continue it after her death as a matter of favour; sometimes attempted to raise a claim as of right; but on every occasion, except perhaps in her ambiguous letter in 1832, rested on the alleged grant to the son of Sumroo, and never pretended that that grant had been superseded by the sunnuds in her own favour, on which the appellants now rely. Her letters, moreover, point to a substantial grant of the estate to Zuffur Yaub Khan in Altumgha, and to the possession of it by him under that tenure. They are quite inconsistent with the case made by the Delhi document, *viz.*, that the Altumgha grant to him endured only three months; and was never perfected by possession. The correspondence also concerning the pensions and the negotiations she entered into on that subject are wholly inconsistent with the theory that she held or claimed to

hold Badshapore in Altumgha by a valid grant to herself.

Sir Roundell Palmer endeavoured to meet the strong presumption with this continued course of conduct, and these repeated representations on the part of the Begum raise against the validity of the alleged sunnuds, by an ingenious theory that she may have conceived that claims founded on an alleged grant to Nawab Zuffur Yaub Khan would be more likely to find favour with Government than one founded on sunnuds in her own favour; because they might treat the latter as superseded by the agreement of 1805. This suggestion, which after all is pure speculation, does not really afford a probable explanation of her conduct. If an Altumgha Jaghire had been granted to Nawab Zuffur Yaub Khan, the Begum had virtually usurped his rights before the cession of the territories west of the Jumna by Scindia to the East India Company. The British Government would in no way be bound, and certainly would be little disposed, to recognise a title which had been *de facto* defeated before the territories in question were ceded to them. They would be less inclined to recognise it if the title of Zuffur Yaub Khan had been of so flimsy a character and short duration, as the case now made represents it to have been: and had been *de jure* superseded by a grant to the Begum in 1789. If the case of the appellants is true, these circumstances might easily have been ascertained by inquiry through the British officers at Delhi. Again, the Begum could not make title to the estate through the son of Sumroo. In seeking to transmit the estate to Dyce Sombre, she sought to transmit it as from herself. It was, therefore, more natural, if she had a title in her by valid sunnuds from Shah Allum, that she should put forward and rely on that title, than that she should rest on the old grant to Sumroo's son which she herself had practically set aside. Nor is it easy to explain why, in 1807, she should have obtained from the Court of Delhi a sunnud, little likely to be recognised by the British Government, and founded on the alleged title of Zuffur Yaub Khan, when, if the present case be true, that title had been already superseded by a valid sunnud in her own favour.

If the validity of the documents on which the appellants now rely were supported by strong and independent evidence, it might be

reasonable to endeavour to account for the Begum's silence concerning them by theories, more or less plausible, of the nature of that put forward by Sir Roundell Palmer. But if, as has been shown, the direct evidence in favour of the documents is weak and suspicious, then the presumptions arising from the acts and conduct of that astute woman should be allowed to have their full and natural weight against them.

The only remaining question is, what effect is to be given to the perwannah alleged to be Scindia's confirmation of the sunnuds? Can it be taken to supply the deficiency in the proof of the sunnuds, and to establish or corroborate the title of the Begum? It is known to have existed in the Begum's lifetime, since a copy of it was sent by her to Government in 1832. There is no other proof, except the seal, of its origin. And the seal, if not fatal to it, casts the greatest suspicion on this document. It is pleaded as a confirmation by Madha Rao Scindia. But the evidence proves that, at its date, Madha Rao Scindia was dead. If, as it has been contended on behalf of the appellants, the confirmation pleaded is to be taken as a confirmation by Dowlut Rao Scindia, the difficulty arises that the document bears the seal of his then deceased predecessor. There was no proof that this seal was adopted and used by Dowlut Rao Scindia, but it was attempted to get over the difficulty by a reference to the case reported in 10th Moore's Indian Appeals, p. 192. In that case there was evidence that the seal of the deceased Zemindar had in several instances other than that in question, been used after his death. Here there is no proof that Dowlut Rao ever in any other instance used the seal of his predecessor; it is highly improbable that he should do so, and it would be dangerous, as well as unreasonable, to hold that, because a loose practice has been shewn in one case to have prevailed in the kutchery of a Bengal zemindar, it may be inferred in another that the same practice prevailed in the Durbar of a powerful sovereign prince. Their lordships, therefore, cannot treat the alleged confirmation of the Begum's title by the Mahratta prince, in 1795, as established.

Weighing then the direct evidence in favour of the sunnuds, weak and suspicious as it is, against the presumptions arising from the non-production of the original sunnud, and the failure to account for it; and against



the still stronger presumptions arising from the acts, representations, and conduct of the Begum in her lifetime, their lordships have come to the conclusion that the appellants have failed to establish the title which they have set up. To decree in favour of a title to an hereditary and transmissible lakhiraj-estate, on evidence so untrustworthy, would be contrary to the long-established practice of the courts in India; and such a decision would be a dangerous precedent.

The proceedings in this case undoubtedly disclose many things which in their lordships' opinion are to be regretted. It is particularly to be regretted that the Government did not, in some way or other, investigate the title of Mr. Dyce Sombre, in 1836, as a question of right, instead of dealing with it by an act of power. It is to be regretted that, in 1849, they did not fairly try the question of title, instead of meeting it by a plea of the statute of limitations. But after the fullest consideration of the case, and with every desire to give to the appellants the benefit of any inference which may be legitimately drawn from the circumstances of this protracted litigation, their lordships see no grounds for believing that, if the cause had been tried in 1836 as an ordinary resumption suit, under the regulations, Mr. Dyce Sombre would not equally have failed to show a good title to an Altumgha tenure in the Begum. If it were necessary for their lordships to express an opinion of the nature of the Begum's interest in Badshapore, they would incline to the opinion that her persistent statement of there having been some grant to Juffur Yaub Khan was not without foundation; that she had in some way usurped his interest when she got undisputed command of the troops; and that the British power found her in the enjoyment of the estate, and left her so during her life. Any such opinion, however, must be, more or less, matter of speculation. For the determination of this appeal it is sufficient to say, that the appellants have, in their lordships' judgment, wholly failed to prove the fourth and sixth of the issues settled in the cause, and therefore to establish the title pleaded by them; and their lordships have come to the conclusion that the appeal in this suit ought, on this ground, to be dismissed and the decrees of the Indian Courts affirmed; and their lordships will advise Her Majesty accordingly.

In "The Arms Suit," their lordships are of opinion, for the reasons already given in the Badshapore suit, that the seizure of those arms and stores was not an act of State, but an act done as under a supposed legal right on the resumption of the Jaidad upon the Begum's death. They think that the evidence shows that the arms and stores were purchased by the Begum, and that there is no authority or evidence to show that those who hold by Jaidad are not entitled to things so purchased. They are entitled to all the rents on performance of a certain duty, which duty ceases on their death, and the next Jaidadhar would be bound to provide arms by virtue of his tenure.

Their lordships think the decree in this suit should declare the appellant entitled to recover from the Government of India the value of the arms and military stores seized, with interest on such value, from the date of seizure, at the ordinary rate of 12 per centum per annum; and that unless the parties agree to name a sum as representing such value, or agree to refer to arbitrators, in this country, the question, what, at the date of the seizure, was the value of the articles seized, the case must be remitted to India, with instructions to the court there to ascertain such value, and give a decree accordingly. Her Majesty's Order on this appeal may be suspended until the parties shall come to a conclusion as to the course to be pursued. The costs in India of each suit will follow the result; and their lordships think that each party should bear their own costs of these appeals.

#### APPEAL No. 1 OF 1872.

UNDER SECTION XV OF THE LETTERS PATENT.

*From a decision of the Hon'ble Justice F. A. B. Glover in Special Appeal No. 728 of 1871, differing from that passed by the Hon'ble Justice Dwarka Nath Mitter, dated 22nd January, 1872.*

THE 26TH JUNE 1872.

Present:

Hon'ble Sir R. COUCH, Kt., Chief Justice,  
 " H. V. BAYLEY, } Puisne Judges.  
 " W. ANSLIE, }

Ranee Doorga Soonduree  
 Doases ... (Plf.) Appellant.  
 Versus  
 Bibee Omdadoonissa ... (Dft.) Respondent.

*For Appellant.*—Mr. W. A. Montrion and Baboo Ashootosh Dhur.

*For Respondent.*—Mr. R. E. Twidale.

Lands used for building purposes are not liable to enhancement under Act X of 1859. A suit for a higher or enhanced rent in respect of lands used for building purposes is cognisable in the Ordinary Civil Courts.

Plaintiff sued in the Court of the Deputy Collector of Jessore for arrears of rent at enhanced rates in respect of cottas 8—9 held by defendant in the bazar of Jessore, at an annual rent of Rs. 7-8-2, on account of the Magh Kist of 1276 after due service of notice under Section 13 Act X of 1859 in the month of Chyete 1275. The prevailing rate was stated to be Rs. 8 per cotta.

Defendant stated that the area of the land in dispute was about 6 cottas and the rent was only Rs. 4 per annum; that no notice was served; that the rent has remained the same since the permanent settlement; that no enhancement could take place; that the prevailing rate was Rs. 16 or 20 per biga per annum, and that the Revenue Court had no jurisdiction to entertain the suit.

The following were the issues framed by the Court of first instance:—

1. Was the Notice duly served?
2. Was the Summons duly served?
3. What is the area of the land?
4. What is the prevailing rate of rent paid by the same class of ryots for similar lands and similarly situated in the places adjacent?
5. The land being entirely occupied as building ground, will a suit for arrears at enhanced rates lie in the Revenue Court?
6. Is the local standard of measurement a biga of 110 cubits or of 80 cubits?

Mr. C. C. Quin, Covenanted Deputy Collector, decided on 28th July 1870 all the points raised, and gave the plaintiff a decree according to the evidence on the record. On the question of Jurisdiction he remarks:—“It has been ruled, I believe, that all suits between landlord and tenant for rent of land can be heard in a Revenue Court, and there does not seem to be any thing in Act X which would shut out suits of this nature, however ill adapted its provisions may be to their decision.”

On appeal by the defendant against this decision, Mr. H. Richardson, the officiating Judge of Jessore, recorded on the 22nd March 1871, the following judgment:—

“I am of opinion that this suit should not have been brought under Act X. The High Court have, on more than one occasion, ruled that suits for rent of houses in a Bazar cannot be entertained under the Act, and the ruling in case of Kalee Mohun Chatterjee, *versus* Kalee Kishen Roy, Vol. XI of Weekly Reporter, page 183, is, I think, conclusive on the point.

I must therefore decree the appeal and dismiss the suit with costs and interest.

Against this decision a special appeal was preferred to the High Court. One of the grounds was—

“That the Judge is wrong in law in holding that this suit cannot lie under Act X of 1859.”

This appeal came on for hearing before Justices F. A. B. Glover and Dwarka Nath Mitter, who, on the 22nd of January, recorded the following judgments:—

*Glover, J.*—The question in this special appeal is whether enhancement of rent can be had under Act X of 1859 on land situate in the middle of a town or bazar and used entirely for building purposes.

The Judge has held, on the authority of Kalee Mohun Chatterjee *vs.* Kalee Kishen Roy, XI Weekly Reporter, 183, that it cannot.

It is contended for the special appellant that the land was originally let as an ordinary ryotee tenure, and that the suit is for rent of the land and not for the rent of the houses. I do not know that this makes any difference, and no attempt has been made to distinguish between the two kinds of rent. I understand Act X of 1859 as referring to land in the state it is in when the suit is brought, and there have been many decisions of this Court to the effect that the provisions of the Act can only apply to land which is at the time used for agricultural or horticultural purposes; and if land originally leased out as an ordinary agricultural tenure, becomes afterwards covered with buildings in consequence of a town or bazar growing up round about it, I apprehend that under the rulings of this Court it loses its agricultural character, and cannot form the subject of an enhancement suit under the Rent Law.

The case of Ram Churn Singh *vs.* Meadun Durzee, VIII Weekly Reporter, 90, is not contrary to this view. That was a suit for house-rent, and it was held that



where that rent included the ground-rent and the two could be clearly separated, a claim for the ground-rent might be cognizable under Act X of 1859. But this opinion was given very doubtfully, the words used being "would perhaps be cognizable."

The case of *Kalee Kishen Biswas vs. Sreemuttee Jankee*, page 250 of the same volume, is very clear on the point. It rules that the occupation intended by Act X is occupation for agricultural or horticultural cultivation.

The case of *Ranee Surio Moyee vs. Blumhardt*, IX *Weekly Reporter*, 552, which has been quoted by the special respondent's pleader, is not applicable, for there the land was leased expressly for building purposes which is not shown to be the case in the suit now before us.

But the case of *Kalee Mohun Chatterjee vs. Kalee Kishen Roy* is directly in point, and decides that Act X of 1859 does not apply to a suit for the enhancement of rent of land, which is situated in the midst of lands used for building purposes and on which the defendant's house is built.

And *Khairooddeen Ahmed vs. Abdool Bakke*, XI *Weekly Reporter*, 411, upholds a similar principle.

So does *Church vs. Ram Tonoo Shaha*, reported in page 547 of the same volume, as does also *Ram Dhun Khan vs. Haradhun Paramanic* in volume XII *Weekly Reporter* 404.

There is no doubt the case of *Bromo Moyee Bewah*, XIV *Weekly Reporter*, 252, in which Mr. Justice Mitter held that there was nothing in Act X of 1859 to justify any distinction between suits for arrears of rent on account of lands used for agricultural purposes and suits for arrears on account of land used for other purposes; but the decision which was that of the senior Judge, Mr. Justice Louis Jackson, was in accordance with the rulings I have already quoted.

It seems to me, therefore, that we ought in this case to follow the long current of decisions which hold that the rent of land used for building purposes cannot be enhanced by a suit under Act X of 1859.

We were much pressed to refer this case for the decision of a Full Bench; but as there has been, so far as I can discover, no conflict of decisions on the point, I do not think that we can do so.

The decision of the lower Appellate Court appears to me correct, and I would dismiss this special appeal with costs.

My attention has been drawn to the case of *Tarinee Pershad Ghose vs. Bengal Indigo Company*, II *Weekly Reporter*, Act X Rulings 9: but with all respect for the opinion of my learned colleague, I cannot think that this is a case in point, but if it be, there can be no doubt that a contrary ruling has been laid down in all the later decisions.

*Mitter, J.*—I am extremely sorry to differ from my learned and honorable colleague.

This was a suit for arrears of rent at enhanced rates, the arrears being alleged to be due on account of a piece of land situated in the Jessore Bazar. The lower Appellate Court being under the impression that the suit was one for house-rent, has dismissed it upon the ground that the Revenue Court, in which it was instituted, had no jurisdiction to try it.

I am of opinion that the decision of the lower Appellate Court is erroneous in law, and ought, therefore, to be set aside.

That the suit is not one for house-rent does not appear to be disputed. It is true that there is a building upon the land in question, but this building, it is admitted on both sides, is the property of the defendant; nor is it for any rent alleged to be due on account of that building that the suit was brought. The case, therefore, falls within the express provisions of Clause 4 Section 23 Act X of 1859, which was the law in force at the time of its institution and which says,—

"All suits for arrears of rent due on account of land Kherajee or Lakheraj shall be cognizable by the Collector of land revenue and shall not be cognizable by any other Court."

The present suit is, as I have explained above, a suit for arrears of rent "due on account of land."—That the land is occupied by a building appears to me to be of no consequence whatever. It is nevertheless "land," exactly in the same sense, as it would have been if it had been cultivated with indigo or paddy: and as the rent claimed is alleged to have issued from the land and not from the building which stands upon it, I am unable to see how it can be held that the suit was brought in a wrong Court, when the Legislature says in so many terms, that

*all suits for arrears of rent due on account of land shall be brought in the Collector's Court, and in no other. No portion of the rent sued for is or is even alleged to be due on account of the building; for that building is, as I have already shown, the property of the defendant, and as such not subject to the payment of any rent to the plaintiff. Nor can the fact that the arrears sued for, are claimed at enhanced rates affect the character of the suit in any way whatever. It is to all intents and purposes a suit for arrears of rent as it is in name; and as it is also a suit for arrears of rent "due on account of land," it seems to be beyond all question that it is capable of satisfying all the conditions required by Clause 4, Section 28, Act X of 1859.*

That Clause, it should be borne in mind, applies to suits for arrears of rent not only against *ryots*, but against all classes of under-tenants. This point has been settled by the decision of the Privy Council in the case of *Dhunput Singh vs. Gooman Singh* (XI Moore, page 463).<sup>\*</sup> That was a suit for arrears of rent at enhanced rates against a quasi-talookdar holding an intermediate position between the proprietor and the *ryots*, and an objection was taken that the Revenue Court in which it was brought had no jurisdiction to try it. Their lordships, however, overruled the objection upon the ground that the Clause above referred to "contains provisions for all classes of under-tenants."

It has been argued that as the land is not used for agricultural or horticultural purposes, the suit was not cognizable by the Revenue Court. I confess that I am at a loss to find out any satisfactory reason to justify such a distinction. There is nothing whatever in the words of the Legislature to support it. On the contrary, as *land* must retain its character as *land* whether it is used for agricultural or for building purposes, the contention seems to be directly in the teeth of the plain and obvious meaning of those words. Why then are we to dismiss this suit on the ground of such a distinction? A suit for arrears of rent due on account of a piece of land occupied by a *ryot's* homestead is clearly governed by Clause 4, Section 28, Act X of 1859, and there are many *ryots* in this country who do not hold any other lands than those occupied by their

homesteads. A *putneedar* who holds an entire *pergunnah* and never uses a single cottah of the lands comprised in his *putnee*, for agricultural or horticultural purposes, would have been liable to be sued under that Clause, if it had been still in force as law; and I see no reason, therefore, why the purpose for which the land is used should have anything to do with the jurisdiction conferred on the Revenue Courts by that Clause. Whatever may be the true definition of the word "*ryot*" as used in Act X of 1859, it is by no means necessary that he should be an actual cultivator. Section 6 says distinctly that a *ryot* who has "*held*" land for twelve years consecutively is entitled to a right of occupancy exactly in the same way as a *ryot* who has "*cultivated*" land for the same period; and as Clause 4, Section 23, applies to all cases in which the subject-matter of the lease is land, I do not see the slightest reason why the defendant in this case should be permitted to object to the jurisdiction of the Revenue Court, even though he may not be a *ryot* within the meaning of the Act. The land for which the rent is claimed is, it is true, situated within a bazar, and it is also true that it is occupied by a building and not used for horticultural or agricultural purposes. But it is nevertheless land in every sense of the term; and as the suit is, therefore, a suit for arrears of rent due on account of land, it was instituted in the only Court in which it could have been instituted at the time. There is nothing whatever in the Act which says that the land should not be situated in a town or in the vicinity of a town; nor is there any thing in it to give the slightest support to the contention that the land should be used for a particular purpose or found in a particular condition at the time when the suit is brought before the Revenue Court can assume jurisdiction to try it. Suppose, for instance, that a *ryot* cultivates his land with paddy for one year and then erects a building upon it or allows it to remain uncultivated in the next year. A suit for arrears of rent due for the first year would certainly be governed by Clause 4, Section 28, Act X of 1859, and I see no reason whatever why the same Clause should not apply to a suit brought for the arrears of the next year.

It has been said that there are several decisions of this Court by which it has been held that suits for arrears of rent due on

<sup>\*</sup> 9 W. R., 3.

account of lands not used for horticultural or agricultural purposes are not governed by Act X of 1859. I have carefully read those decisions, but with the greatest deference to the learned Judges by whom they were passed, I feel myself bound to say that they are based upon an erroneous construction of the law. I wish to add further that there are some decisions to the contrary effect (see *II Weekly Reporter*, Act X Rulings, page 9, Gap Number, Act X, page 78, ditto page 102, ditto page 46, *V Weekly Reporter*, Act X, page 60, *VIII Weekly Reporter*, page 90), so that there is no ground whatever for saying that the question has been set at rest by a long and uniform current of decisions. Indeed, the point was only a few days ago referred to a Full Bench in Special Appeal No. 31 of 1871, though I regret to say that the reference fell through in consequence of the Judges sitting on the Full Bench having come to the conclusion that the question did not arise in that particular case.

As however, the view taken by me is in conflict with that taken by some of the learned Judges of this Court, I would reverse the decision of the lower Appellate Court subject to the opinion of a Full Bench."

Under Section 36 of the Letters Patent of 1856, the judgment of Justice Glover became the judgment of the Court. Hence the present appeal. It came on for hearing on June 26th 1872 before the Hon'ble Sir Richard Couch, Kt., Chief Justice, Hon'ble H.V. Bayley, and Hon'ble W. Ainslie, Puisne Judges.

Mr. Montriou urged for the appellant the arguments upon which Justice Mitter rested his judgment. Mr. Twidale in answer supported the judgment of Justice Glover. Mr. Montriou was heard in reply after which the following judgment was delivered:—

*The Chief Justice.*—This suit was brought in the Court of the Deputy Collector of Jessore, under Clause 4, Section 23 of Act X of 1859, for arrears of rent at an enhanced rate of land held by the defendant in the Jessore Bazar. The land was occupied by a building which was admitted to be the property of the defendant and no part of the rent claimed was alleged to be due on account of the building. When, or under what circumstances the building was erected does not appear.

The Deputy Collector made a decree for rent at an enhanced rate which was reversed by the Officiating Judge of Jessore on the ground that the suit should not have been brought under Act X of 1859. He seems to have considered it as a suit for the rent of a house which it was not, but possibly he may have meant the rent of the land upon which the house stood.

On special appeal to this Court the learned Judges, by whom the case was heard, were divided in opinion, Mr. Justice Glover holding that the rent of land used for building purposes cannot be enhanced by a suit under Act X of 1859, and Mr. Justice Mitter holding that a suit for arrears of rent of land, although it was occupied by a building, was within Clause 4 of Section 23, apparently assuming that, if a suit for rent would lie, a suit for enhanced rent would.

And if by land in that Clause is meant land occupied by a building, I do not see how the conclusion, that a suit for a higher or enhanced rent of such land may be brought in the Collector's Court, can be avoided. The erection of a building upon the land with the consent of the landlord does not give to the occupant a right to hold the land perpetually at the same rent. If his rent was liable to be raised before, it would be so still, unless the circumstances amounted to an implied contract on the landlord's part that he should always hold at the same rent or in fact to the grant of a perpetual tenancy at a fixed rent which would be determined by the Court in a suit between them.

If, as Mr. Justice Mitter thinks, Section 6 of Act X applies, and a ryot holding such land for 12 years has a right of occupancy, Section 17 must also apply so far as the grounds for enhancement can be made applicable.

But I think that, in determining what is the meaning of land and holding land in Act X, we must look at all the provisions of the Act. It may be assumed that it was not intended that one part of it should apply to one kind of land and another part to another, and that land in Section 23 should have a different meaning from what it has in other Sections. The Deputy Collector says with truth that it is extremely difficult to apply to bazar lands occupied merely as building ground, the provisions of Section 17 which

are manifestly intended to be applied to the rent of lands used for agricultural purposes.

And these are not the only provisions in the Act of which that may be said. Section 112 and the following Sections can only apply to land used for cultivation. The intention of the legislature is to be deduced from the whole Act and a construction which makes the whole of it consistent is to be preferred. I think this is the ground of the decisions in this Court that lands used for building purposes are not liable to enhancement under Act X.

And when we consider that a right of occupancy of land used for building purposes at a permanent rent may depend in some cases upon the terms of the original letting or upon equities arising out of the landlord's conduct, the suit for a higher or enhanced rent seems to be properly cognizable in the Ordinary Civil Courts. I therefore think the decree should be confirmed.

R. COUCH.

26th June, 1872.

Mr. Justice Ainslie.—I concur.

W. AINSLIE.

Mr. Justice Bayley.—I am of opinion that the suit for enhancement under the circumstances of this case will not lie under Act X of 1859, and the current of decisions is to that effect.

H. V. BAYLEY.

26th June, 1872.

**In the High Court of Judicature at  
Fort William in Bengal.**

THE 27TH OF APRIL, 1872.

*Present:*

The Hon'ble F. B. KEMP,

„ „ F. A. B. GLOVER,

*Two of the Judges of this Court.*

CASE No. 2705 OF 1871.

Section 337—Code of Civil Procedure—Construed.

When a party appeals against that portion of the decision which affects himself, the whole decree cannot be reversed or modified under Section 337 Act VIII of 1859 as against parties who have not appealed.

*Application for Review of Judgment passed by the Honorable Elphinstone Jackson and the Honorable Omecool Chunder Mukerjia, two of the Judges of the said Court, passed on the 15th of July 1871 in Special Appeal No. 294 of 1871.*

Ram Chunder Pal and Nobo } Plaintiffs,  
Kishore Sen. } Petitioners.

versus

Omora Charan Deb and others } Opposite  
parties.

*For Petitioners*—Messrs. Woodroffe and M. M. Ghose, and Babus Doorga Mohon Das and Rajendra Nath Bose.

*For the opposite party*—Babus Sreenath Doss, Grish Chunder Ghose, Roma Nath Bose and Romesh Chunder Bose.

The plaintiffs allege that they purchased a seven annas share of a zemindary in the district of Sylhet at an auction sale for arrears of revenue: that they had been put in constructive possession of the said share by the Collector as prescribed by Section 29 Act XI of 1859; that immediately after they had been so put in possession, the defendants (who were altogether 135 in number) with the exception of one who was a mere *proforma* defendant, being a person in whose name one of the plaintiffs had bought his share in the zemindary at the said auction sale, combined together and resisted the plaintiffs' taking possession upon the ground that they the 134 defendants, were the former proprietors of the said zemindary. The plaintiffs therefore prayed for the possession of the seven annas share which they had purchased, and also for mesne profits.

Of the said 134 defendants, many did not appear at all, while those that appeared presented separate written statements either singly or in groups of two or more. The defence of Omora Charan Deb, one of the defendants, was that he and his brothers did not combine with the rest of the defendants in keeping the plaintiffs out of possession, and that he and his brothers were not the defaulting proprietors of the zemindary a share of which the plaintiffs had purchased, and that all the lands which he and his brothers held in the zemindary had been long before the sale separated from the rest of the zemindary, and a separate account had been opened on account of the same, under Act XI of 1859, and that the

# CRIMINAL RULINGS.

## High Court of Judicature at Fort William in Bengal.

The 24th June 1872.

### CRIMINAL APPELLATE JURISDICTION.

Present :

The Hon'ble F. B. Kemp and } ... Judges.  
 „ „ F. A. B. Glover }

In the matter of Jannobee Chowdhraim,  
 Petitioner.

Mr. J. T. Woodroffe, and } For Peti-  
 Baboo Sresnath Doss, ... tioner.

Section 367 Code of Criminal Procedure—Native Lady—  
 Witness—Mode of examination.

Under Section 367 of the Code of Criminal Procedure Sessions Judges are bound to satisfy themselves in the first instance before they issue summons on a witness, that the evidence of such witness is essential to the just decision of the case and when a Native lady is summoned they ought to examine her in such a manner as is consistent with native social usages, care being taken to see that she is not subjected to any insult and that her rank and social position be taken into due consideration.

In the case of Queen *versus* Goreeboola Turufdar and five others, who were charged with several counts before the Deputy Magistrate of Tangail, in the district of Mymensing, in connection with the murder of one Jubber Khan, Goreeboola applied to the Deputy Magistrate on the 16th of May last for the issue of a summons to Jannobee Chowdhraim, Zemindar of Pergunnah Kagmary, requiring her to attend the Sessions Court; to which he (Goreeboola) had been committed, along with the other prisoners, by the said Deputy Magistrate, to take their trial. The Deputy Magistrate refused the application on 20th May, on the ground that its object was only to cause harassment and annoyance to the lady. Thereupon Goreeboola renewed his application on the 27th idem, before the Sessions Judge of Mymensing, with reference to which that officer recorded the following order:—

27th May 1872.

If the Deputy Magistrate considers the witness in question is included in the list of witnesses for the purpose of vexation, he should proceed according to the provisions of Section 228, and fix such a sum as he may

consider necessary should be deposited, in the first instance, to defray the expense for the witnesses' attendance at the Sessions.

W. J. MONEY.

On receipt of this order the Deputy Magistrate issued a summons on Jannobee Chowdhraim on 31st May last which was returned as duly served. But the lady having refused to attend the Court notwithstanding, Goreeboola applied to the Sessions Judge through his Counsel for the issue of other processes to compel her attendance in Court. On the 17th of June last, the Mookhtear of Jannobee Chowdhraim put in a petition protesting against the issue of warrant against the lady. The Judge however passed the following order:—

“It appears that a witness Jannobee Chowdhraim, summoned to attend this Court, has not appeared, and that upon the return of the summons to the Magistrate, that officer took no further steps to secure her attendance, although requested to do so by the Counsel for the prisoner, but referred the matter for the orders of the Sessions. Unnecessary delay has consequently arisen; as this Court has no power to issue a warrant for the attendance of a witness with a view to his giving evidence. The Counsel for the prisoner has stated to the Court, that the witness is an important one for the defence. Under these circumstances it appears advisable for the ends of justice that the trial should be adjourned, and it is accordingly so, till the ensuing Sessions.

“A copy of this order will be forwarded to the Magistrate, and he will be directed to take necessary legal steps to secure the witnesses' attendance at that date.

W. J. MONEY,

Sessions Judge.”

17th June 1872.

The 16th of July was fixed for the trial, and the Magistrate directed the Deputy Magistrate of Atia to carry out the order of the Sessions Judge.

Against the orders of the Sessions Judge Jannobee Chowdhraim presented a petition to

the High Court through her Counsel; upon which Justices Kemp and Glover passed the order which is subjoined:—

By MR JUSTICE KEMP.—This is an application on the part of Jannobee Chowdhraim, the Zemindar of Pergunnah Kagmary in Zillah Mynensing. It appears that in a Sessions case this lady has been cited by one of the prisoners as a witness. The Deputy Magistrate of Taugail, Mr. Andrews, was of opinion that the witness was included in the list of witnesses cited by the defendant for the purpose of vexation, and that, as the accused person was not able to satisfy the Deputy Magistrate that there were reasonable grounds for believing that the evidence of this lady was material, the Deputy Magistrate therefore refused to summon her. The Sessions Judge states on the information of Counsel, that the witness was a material witness, he has directed her to be summoned, and the trial has been adjourned for that purpose. Under Section 367 of the Code of Procedure, the Sessions Judge has the discretion "at any stage of a trial to summon and examine any witness whose evidence he shall consider essential to the just decision of the case." It does not appear to us that in the exercise of this discretion the Sessions Judge has satisfied himself that the evidence of this lady is material, or that there are reasonable grounds for believing that such evidence is essential for the just decision of the case, and it was all the more incumbent upon the Sessions Judge to have done so, because the Deputy Magistrate had held that this lady was summoned by the prisoner for purposes of vexation. We therefore direct the Sessions Judge first, on consideration of the evidence for the prosecution, and after examining the prisoner, to satisfy himself that the evidence of this lady is essential for the just disposal of the case, and if he arrives at the opinion that her attendance is essential for the just decision of the case and that it is necessary to examine her, he will examine her in such a manner as is consistent with native social usages, taking care that she is not subjected to any insult. We leave this to the discretion of the Judge who will take into consideration the rank of the lady and her social position.

MR. JUSTICE GLOVER.—I am of the same opinion. The Sessions Judge, I think, is bound to decide whether or not the witness's evidence is material, and whether or not she has been called merely for purposes of vexation before exercising his discretionary power under Section 367. The Magistrate, before he insists on a witness's attendance, is bound to satisfy himself under Section 228, and it appears only reasonable that when the Judge takes the responsibility of a summons on himself, he should do likewise. Of course if he decides to summon the lady he will take care that the examination is conducted in conformity with native usages when a lady of rank is a witness.

Upon the above order of the High Court reaching the Sessions Judge of Mynensing, that gentleman at once addressed a letter protesting against the order to the Registrar of the High Court, asking him to lay the same before the Hon'ble Judges who had passed the order referred to. The letter was accordingly submitted before the learned Judges, who recorded the following order with reference to the remarks of the Sessions Judge:—

We have considered the letter of the Sessions Judge. It appears that Mr. Justice Kemp was in error in stating that the witness, Jannobee Chowdhraim, had not been summoned at all by the Deputy Magistrate, Mr. Andrews. That she was so, is clear; though we think this, the opinion of the Deputy Magistrate, viz, that this lady was cited by the prisoner merely for purposes of vexation, was in no ways modified. We desire that our previous instructions may be carried out strictly in the manner laid down in our decision of the 24th ultimo.

F. B. KEMP,

F. A. B. GLOVER,

\* Judges.

6th July 1872.

In the meantime no warrant will issue.

# REVENUE CIRCULARS.

## Revenue Circulars.

MAY, 1872.

V. H. SCHALOH, ESQ.,

### No. 1.

THE attention of Local Officers is called to the High Court's judgement in the case mentioned in the margin, reported at page 230, Volume VIII, *Bengal Law Reports*, wherein it has been laid down that in all sales held by the Collector for the realization of Government demands realizable as arrears of revenue, the procedure laid down in Act VII of 1868 (B. C.) is to be followed:

2. Therefore where a fine had been imposed for non-attendance of proprietors before a Deputy Collector for the purpose of a partition under Regulation XIX of 1814, and the amount had been ordered to be paid on a given day, but was not so paid, but tendered subsequently, it was held that the Collector ought not to have sold the property of the defaulters, but should have received the amount tendered.

### No. 2.

THE following is added as Clause 1 A, Section 13, Chapter XI, page 187, Board's Rules—

When any person is confined in the Civil Jail for non-payment of a debt to Government, the sanction of the Board is necessary to his release, so long as a sum exceeding Rs. 1,000 remain due from him.

### No. 3.

It is hereby notified for general information that the Board of Revenue having referred to Government the question, whether,

with reference to the Road Cess Act, the additional one per cent. under Clause 4, Section 8, Chapter XX, page 282 of the Board's Rules, should continue to be levied in all estates coming under settlement, the Government has decided that the extra one per cent. should be retained where it is paid under existing engagements, and that arrangements for its payment at future settlements should continue to be effected, at any rate until the Road Cess Act is in full operation.

### No. 4.

THE latter part of Clause 1 A, at page 32 of the Board's Rules which was corrected by Circular Order No. 6 of December 1871, is restored and should be read as it stood in Circular Order No. 6 of February 1871—“And either return the pieces to the person tendering the coin, or, at the option of the latter, receive it at the rate of one rupee per tolah.”

2. The following is added as Clause 1 G, at page 32—“One-fourth and one-eighth of a rupee coin should be received as legal tender for the corresponding fractions of a rupee at their nominal value, irrespective of the diminution in their weight for reasonable wear and tear, provided that they have not been clipped or filed, or defaced or diminished otherwise than by use.”

### No. 5.

THE following rule is added as para. 19 A of the instructions for the administration of the Land Acquisition Act X of 1870—

19 A.—Whenever an award is made by an Assistant or Deputy Collector empowered to act as a Collector under Section 3 of the Act, it must receive the approval and confirmation of the Collector of the district, before the sum awarded is tendered under Section 11 to the persons entitled to receive it. To allow time for the necessary reference to the Collector, an Assistant or Deputy



Collector engaged in making an award should, after making the requisite inquiries under Section 11, postpone his final award under the provisions of Section 12, and report his opinion on the case to the Collector, forwarding at the same time all documents which may seem necessary to enable that officer to judge of the propriety of the proposed award. On receiving such report, the Collector will pass orders upon it, which orders will be final. The completion report of every case under the Act, and every progress report when such reports are submitted, must be subscribed with a certificate signed by the Collector, that the prices awarded are not in excess of those for which similar lands are actually sold in the same parts of the district, or, in case the Collector should be unable to find evidence of the circumstances of actual sales, that the prices awarded are not greater than those which similar lands in the same parts of the district might be reasonably expected to command. When the lands to be occupied are considerable in extent, the Collector may, after confirming a few initial awards, authorize the adoption of the same rates in regard to *similar* lands to be subsequently occupied under the same declaration. In such cases the officer engaged in making the awards may tender compensation at the rates so fixed without further reference, merely certifying with each progress report that no compensation has been tendered by him, except under sanction of the Collector, either express or constructive, as above prescribed. It will be the duty of the Commissioner in forwarding the progress reports to the Board, to record his opinion in respect to the suitability or otherwise of the awards shown in them.

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#### No. 6.

In preparing the Business Return No. VIII, District Officers should include "notices of enhancement and relinquishment" served by orders of the Collector under Sections 14 and 20, Act VIII (B. C.), 1869, under heading 4 of the revised form of that return.

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A. MONEY, Esq., C. S.

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#### No. 7.

The monthly return prescribed in para 9 of the rules issued by the Lieutenant-Governor

nor of Bengal for the guidance of all officers engaged in carrying out the provisions of Act VIII of 1872, will bear the number VI A- on the Board's list of periodical returns.

The half-yearly returns required by the Government of India (Returns Nos. 1, 2, and 3, in the Financial Regulation No. 2887, dated 19th April 1872,) will bear the numbers XXIII A, XXIII B, and XXIII C, respectively, on the Board's list.

The annual return required by the Government of India (Return No. 4 in the Resolution above quoted) will take the place of the present Income Tax Return No. XLIII in the periodical return list.

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#### No. 8.

REFERRING to Circular Order No. 8 for April 1872, District Officers are requested to send the reports therein called for through the Commissioner of their Division, who will forward them with his own report to the Board.

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#### No. 9.

UNDER the orders of Government the following rule is issued for the guidance of officers engaged in assessments of Income Tax under Act VIII of 1872—

If any person whose income is derived from the profits of land alone shall object to the assessment made upon him, and shall prove that he is a farmer or under-tenant of lands paying less than Rs. 1,000 as rent to landlords, and that he has no permanent rights, but is a mere tenant, such person shall be exempted from income tax.

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#### No. 10.

ADD the following as Clause 29 A, Section XI, Chapter V, page 68, Board's Rules—

29 A.—In using the hydrometer, special care should be taken that no saccharine matter is introduced into the liquor after it has been drawn from the still, and before it is tested. This is sometimes done by allowing the liquor to trickle over a little bag into the vessel which receives it for testing. The effect of the addition of sugar, or other soluble matter to spirit, is to heighten the specific gravity, and to weaken its strength, thereby entailing loss of revenue.

(From the Pioneer, June 15, 1872.)

I.—Let Government put an end to the publication of all but a single edition of Reports. This could be very easily done. The present Reports are to a large extent dependent on Government support, given either directly in the shape of salaries paid or copies bought, or, indirectly, by the permission to have access to the rulings of the courts. It may safely be said that no edition of Reports, to which Government refused some such support, could hold its own. If, however, it were found necessary to do so, there would be no difficulty in prohibiting reference, by counsel in argument, or by the court in its judgment, to any but to certain sanctioned Reports, such a provision applying, of course, only to rulings of the Indian Courts.

II.—Let these sanctioned Reports be a single edition of Indian Reports, edited by the Legislative Department of the Government of India with the concurrence and assistance of the several Chief Justices.

III.—Invite the present Chief Justices to become honorary members of the Legislative Council, and, for the future, let it be understood upon the appointment of a Chief Justice that one of his principal duties will be to advise Government on points requiring legislation, and to superintend and control the reporting of the decisions of his Court for the consideration of the Legislative Council. Further, strengthen the Legislative Council by the addition of any Civilians who take especial interest in law and show especial interest in questions connected with its administration.

IV.—Appoint a standing committee of the Legislative Council which might be called the Amending Bills Committee, whose especial business it should be to consider the cases referred, and the amendments recommended, by the Chief Justices, and, from time to time, to submit Amending Bills in which such amendments as had been sufficiently considered and agreed upon might be embodied. Of this Committee the Legal Member of Council should be *ex-officio* Chairman, the three Chief Justices should be *ex-officio* members, and with a view to getting the fullest advantages of the Chief Justices' opinion, members of the committee might, if necessary, be allowed to vote by proxy. A special Secretary should be attached to

the committee, or an Under-Secretary to Government in the Legislative Department be appointed, who might relieve the principal Secretary of other duties, and allow him to devote sufficient time to the Committee.

V.—Let the report of this Committee, together with the Bills, embodying the proposed amendments, be published in the *Gazette*, circulated to Local Governments, and thus the utmost consideration and publicity be secured before the Bills become law.

VI.—Let the Committee also decide which of the cases referred by the Chief Justices should be reported.

VII.—The gentlemen at present employed, at the various High Courts in the task of reporting, should be appointed officers of the court, whose business it should be to read all the judgments carefully, submit to the Chief Justice cases which appear *prima facie* to require reporting, and, in important cases, attend at the hearing, take notes of the arguments of counsel of the cases cited, and give the fullest possible account of the grounds on which the decision rests. If the Chief Justice allowed the report, he would, if he thought necessary, in consultation with his colleagues or with the Judge who tried the case, offer remarks of his own as to the mode in which he considered the law to require amendment, either in correcting, amplifying, or illustrating.

VIII.—In order to give the Chief Justices leisure for the new duties imposed upon them, the High Courts should be relieved of all original Civil work, except particular specified classes of cases, *e. g.*, Admiralty Probate, Insolvency, Marine Insurance, &c., &c., and such cases as it pleased them, on special grounds, to call up for hearing; and of all criminal work except the trial of European British subjects. Much of the work at present done with High Courts would be perfectly well discharged by the ordinary Civil tribunals, or, as to criminal cases, by the regular Magistrates and Sessions Judges.

IX.—The powers of the High Courts, their procedure and the laws to be administered, should be ascertained and defined by legislation in the clearest possible manner. Their ordinary procedure ought to be assimilated to that of the other courts of the country, which indeed they already resemble in every important particular, and only differ from just enough to introduce confu-

sion, and to justify constant references to English laws, and to precedents which, in many cases, have long become obsolete everywhere but in India. The amended Code of Criminal Procedure has, to a large extent, provided for this matter so far as regards criminal trials; but the same thing ought undoubtedly to be done in every other department of justice. The High Courts would then become a real school of law for the rest of the country. At present the value of their proceedings on the original side is frequently diminished by a doubt as to how far, if at all, the law, according to which they administer, is binding on mofussil courts. On such subjects, for instance, as the Law of Contracts and Evidence there were, until recent legislation placed all the courts of the country on an equality, very important differences between the law followed by the High Courts on the original side and that observed in provincial tribunals. Such a difference is, at the present day, absolutely meaningless, and involves an enormous waste of power. It diminishes the number of cases in which the lower courts can look to the High Courts for guidance, and introduces an entirely unnecessary element of confusion into the already sufficiently tangled web of Indian Jurisprudence. It is, moreover, very bad economy, from a financial point of view, to employ High Court Judges to try cases which outside the courts of a presidency town are disposed of in a perfectly satisfactory manner by officers who do not draw a quarter of a High Court Judge's pay. As it is, so much of the Judge's time is taken up in trying cases, which Small Cause Court Judges and Magistrates are elsewhere considered competent to deal with, that the work of legislation goes on, apparently without interference or assistance on the part of the judicial body. Take such a measure, for instance, as the Evidence Act. Surely here, if ever, was an occasion on which the experience and knowledge of the Judges should have been utilized. Yet so far as we gather from the printed Reports, no single communication appears to have reached the Government from any High Court. If this is so, one of the most important checks on rash, ill-considered legislation would appear to have been neglected. No persons are so competent to speak about the defects of the law as the heads of that profession whose tasks it is to administer and explain it.

Such are the general outlines of the scheme which we venture to put forward. The principle on which it proceeds has, we consider, passed beyond the region of controversy; the best mode of carrying it into effect remains to be ascertained.

#### NOTIFICATION.

*The 2nd July 1872.*—The following Rules for the examination of candidates for Civil Appointments are published for general information:—

1. An examination of candidates for admission into the roll of persons qualified for civil appointments under this Government will be held in the month of February 1873.

2. A preliminary examination in English and the vernacular, of those candidates who have not already qualified in those subjects, will be held on a prior date to be hereafter notified.

3. The following persons only will be admitted as candidates for appointments of Rs. 100 per mensem and upwards:—

(a) Persons who have been six years in the service of Government.

(b) Persons who have passed the Entrance examination and have been three years in the service of Government.

(c) Persons who have passed the First Arts examination and have been one year in the service of Government.

Provided that they have in each case attained and have held for not less than one year a responsible permanent appointment above that of copyist in one of the civil departments of the Government service, and can produce a sufficient certificate of ability, good conduct, and fitness for promotion from their official superiors.

(d) Persons who have taken a University degree in Arts, Law, Medicine, or Engineering.

(e) Persons who may be specially authorized by Government to appear as candidates by a certificate under the hand of a Secretary to Government.

Persons eligible for admission as candidates for appointments of less than Rs. 100 per mensem.

4. The following persons will be also admitted as candidates for appointment of less than Rs. 100 per mensem :—

(a)—Persons who have served Government with credit and efficiency for not less than three years, whose thorough facility in the use of the vernacular is certified, and who pass a preliminary examination in English.

(b)—Natives of Hindustan and of other districts which may be hereafter specially notified, who have served Government with credit and efficiency for not less than three years, and who can show that they have received a thoroughly good education in the vernacular.

(c)—Persons who have passed the Entrance examination in one of the two first divisions.

(d)—Persons who may be specially authorized by Government to appear as candidates by a certificate under the hand of a Secretary to Government.

5. A certificate will be required from every candidate of his character, respectability, and general moral fitness,—such certificate being signed by two gentlemen of his own nationality, resident in the district of which he is a native or where he usually resides, and also signed by the Judge or Magistrate of such district. The certificate of the two first named is expected to be based upon personal knowledge, and the certificate of the Judge or Magistrate to indicate that the gentlemen who have signed it are qualified by their position and character to give such a certificate, and that the Judge or Magistrate himself knows nothing to the prejudice of the candidate. In the case of the town of Calcutta, instead of the signature of the Judge or Magistrate, the certificate should bear that of any Judge of the High Court, or the Commissioner of Police, or the Commissioner of the Presidency Division.

6. Each candidate will be required to produce a certificate from a medical officer, who will be specially selected for the purpose, stating that the candidate is generally a man of sound health, that he has expressed his willingness to serve in any district of the Lower Provinces, and that he (the medical officer) believes him to be capable of doing so, so far as can be judged antecedently.

7. (a)—Every candidate for an appointment of Rs. 100 per mensem and upwards will also be required to prove that he can ride, and for this purpose he may apply to the Magistrate of the district, who will either satisfy himself on the point, or select some other person he thinks competent for that purpose. The examiner must certify from his own personal observation that the candidate can ride not less than 12 miles at a rapid pace, and is in this respect competent for all practical purposes of district work; and if such examiner be not the Magistrate himself, the certificate must be countersigned by the Magistrate. All candidates presenting themselves without such certificate will be required to appear before some person in Calcutta who will be selected for the purpose.

(b)—Every candidate for an appointment of less than Rs. 100 will be required to prove either that he can ride as above, or that he can walk twelve miles within 3½ hours without difficulty or prostration, to be certified in the same manner as the riding.

8. Previous to the other examinations, European candidates who have not passed any University examination will be required to pass an examination in English, in order to show that they possess a thorough knowledge of reading, writing, and arithmetic. They must be able to write well, quickly, and correctly, from dictation, to compose a report, and to do all ordinary arithmetic correctly and quickly, which must be duly certified by the examiners.

By European is meant any person whose native language is English or any other European tongue.

9. Besides procuring the above certificates, all candidates, subject to certain exceptions hereinafter mentioned, will be required to pass an examination

- (1) In the Vernacular.
- (2) In Drawing, Surveying, and Engineering.

They may also pass an examination

- (3) In Law.
- (4) In the elements of Botany and Chemistry.
- (5) In Gymnastics.

And a qualification in the three last subjects will count *pro tanto* in their favor.

10. No candidate who does not pass in Law will be eligible for an appointment of Rs. 100 and upwards. For all appointments those who pass in the elements of Botany and Chemistry and in Gymnastics will be preferred if they are otherwise fit.

*Examination in the Vernacular.*

11. All native candidates will be required to show that they can read and write office papers and orders in the vernacular with complete facility.

12. All European candidates will be examined as to their ability to speak and understand a vernacular language, to read it in print, and translate it. Their knowledge of it must be sufficient to enable them to do business easily immediately on appointment.

13. The vernacular language in which candidates will be required to pass under the two preceding rules may be either Bengali or Hindustani, Oorya or Assamese.

Candidates who pass in Bengali only will not be eligible for vacancies in Behar, nor will candidates who pass in Hindustani only be eligible for vacancies in Bengal or Orissa.

*Examination in Drawing, Surveying, and Engineering.*

14. Candidates will be examined in the following subjects:—

I. *Drawing.*

II. *Surveying.*

- Including 1.—Mensuration.  
2.—Surveying with chain, and with compass and chain.  
3.—Levelling.  
4.—Construction of field-book, plotting, tracing on the ground.  
5.—Construction and use of scales.

III. *Engineering.*

- Including 1.—General knowledge of properties of building materials in most common use, and of constructive trades.  
2.—Estimating for a simple building or bridge.  
3.—Construction of simple buildings.

4.—Construction of simple roof and bridge trusses for small spans.

5.—Elements of road-making (including the construction of culverts and small bridges).

15. Candidates for appointments of Rs. 100 per mensem and upwards, who have obtained an overseer's certificate, and candidates for appointments under Rs 100 per mensem, who have obtained a Sub-Overseer's certificate, will be exempted from examination in drawing, surveying, and engineering.

*Examination in Law.*

16. Candidates who possess a degree in Indian law will not be required to pass the examination in law.

All others will be examined in the elements of the law prevailing in Bengal in the following branches:—

(a) To qualify for the Police and Non-Regulation appointments.

*Criminal Law.*

Penal Code.

New Code of Criminal Procedure.

Police Act V of 1861.

In this examination books will be allowed.

(b) To qualify for Subordinate Executive Service and other civil appointments—

1. Criminal Law as in (a).
2. Revenue and General Law as follows:—

Regulations I, XIII, and XLVIII of 1793, and XII of 1817.

„ I, II, and VIII of 1819.

„ VII of 1822, IX and XI of 1825, and IX of 1833.

Acts IX of 1847, XXXI of 1858, and IV (B.C.) of 1868.

„ XI of 1859.

„ VII (B. C.) of 1868 and VIII (B.C.) of 1869.

„ XXI of 1856, XXIII of 1860.

„ V of 1861.

„ VIII of 1871.

„ X (B. C.) of 1871.

Municipal Acts in force in Lower Bengal.

In the examination for Revenue and General law books will not be allowed.

(c) To qualify for the Opium Department.

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## TRIAL BY JURY.

In the Presidency towns of British India, trial by Jury has prevailed since the earliest days of the British Indian Government. Indeed, an Englishman could never persuade himself to believe that the administration of criminal justice was sound or otherwise unimpeachable, unless the party charged with any offence was judged on the facts and evidence by a jury of his peers. It is not our purpose at present to discuss the propriety or otherwise of this opinion; the fact, however, is certain that he has been taught from his infancy to regard the jury system as the very Palladium of British liberty, and accordingly we find that soon as old John obtained a firm footing in the country, no time was lost in establishing the Supreme Courts in our Presidency towns for the administration of justice on the English model. The law which these Courts had to administer was substantially the English law, except under certain specified circumstances when a departure from the rule was allowed. Since the establishment of the High Courts however, a different state of things has prevailed. A simpler and a more improved Civil Procedure has been introduced, and the Indian Penal Code has superseded the English Criminal law. The trial, however, by a petty and occasionally a special jury still exists, the farce of an initial trial by what was

called the Grand Jury having been already dispensed with.

By Act XXV of 1862, trial by jury was first extended into the Mofussil or interior of the country. A similar provision was contained in Act VIII of 1869, which however has just been repealed by Act X of 1872. This last Act which comes into operation from the 1st of January next also provides for trial by jury or Assessors, according as the Government may choose to introduce the one or other system into the several districts.

We propose to discuss in this paper the relative merits and demerits of trials by jury as well as those by Judges only without the assistance of jurors or Assessors, so far as the circumstances of the country are concerned.

We are free to admit that trial by jury is not wholly foreign to the ideas of the people. The system is analogous to what is called the *Punchayet* which, as is well-known, has existed in the country from time immemorial and has always been regarded as part and parcel of our village communities. In all social matters, such as caste questions &c., even now the *Punchayet* is all powerful all over the country, and the verdict of the tribunal is acquiesced in with a degree of complaisant cheerfulness which unmistakably points to the excellence of the institution. This, we think, is due to the uncontrolled and free exercise of their judgment in matters with which our

countrymen are perfectly familiar. A similar result, however, cannot be expected when they find themselves at their wits' end in the presence of the Huzoor and are called upon to decide questions of fact upon evidence which they do not know to sift or analyze.

The jury system pre-supposes the extreme improbability, not to say the impossibility, of securing a just and impartial verdict, in the event of the trial and decision in a case being left in the hands of the Judge, without the intervention of a certain number of the equals of the accused. We do not understand how the jurymen drawn from different ranks of society are the equals of the prisoner charged with an offence, and even if they were, how the mere *factum* of this equality is enough to secure a proper verdict. This precaution is resorted to only with a view to guard against an improper or unjust conviction, as if the learning, integrity and the high position of the Judge are no sufficient safe-guard against an unlawful finding. Evidently the benefit is accorded to the accused to facilitate his escape from a merited punishment. What else can possibly be the object of having the trial conducted in the presence of a number of his *equals*? No confidence is reposed in the Judge. He is believed to be capable of perpetrating any amount of injustice, unless he is restrained by the superior integrity of a few untrained Judges of fact, whose finding on the evidence is held to be conclusive of the guilt or innocence of the accused. If the object of the system is to enlist the sympathy of the jurors on behalf of the accused, what guarantee have we of *justice* being done in every individual case?

It is said that the system fosters public spirit and trains the intelligence of the people. We should like to know how many of those whose names are returned annually as eligible to serve on the jury are really empannelled for actual service in the Courts. Out of a population of upwards of ten lacs, not more than one hundred and fifty or thereabouts are

required to attend the Courts as jurors. Thus the amount of actual benefit in the promotion of a spirit of co-operation for the welfare of the community at large is so trivial that it is apt to be overlooked in the general reckoning.

Suppose the benefit were greater than we have indicated above, we do not see how that could justify the abstraction of poor people from their daily work for days together, in order to teach them how to sift the evidence and how to merge *self* in the community at large. This objection, however, we would fain waive, if these jurors were allowed a fair remuneration for every day they were obliged to absent themselves from their own business.

It is next urged that the decision of a single Judge cannot command the same degree of confidence that the decision of five, seven or twelve men, good and true, does. But we must not forget that it is not the number of judges that determines the quality of the tribunal. One trained judge is decidedly preferable to a host of ill-educated shop-keepers or farmers.

Judges in this country are required under the law to write out their decisions at full length, giving reasons in detail for the conclusions at which they have arrived. This, certainly, entails on them the necessity of attending to the proceedings before them with particular care. The argument therefore—that if the jury system were dispensed with, and the Judges were not required to sum up the evidence in their charge to the jury, they would not pay that continuous attention to the evidence that is offered before them which they are now obliged to do under the present procedure—falls through as wholly untenable.

With regard to the argument that the jury are less liable to bribery and corruption than Judges, we have only to refer the advocates of the jury system to the English Statute Book which clearly affords conclusive evidence on the point. So recently as 1729, we find in 3 George II a reference to the "many evil practices which have been used in corrupting of



jurors returned for the trial of issues." Most of our readers are aware that there was a time, and that not long ago, when "the good will of the Sheriff" figured as an item in an Attorney's Bill of Costs.

Let us now look to the other side of the question, that is—the competency of trained Judges to decide a criminal case on the merits. These, certainly, are gentlemen by birth and education, and having been accustomed, since they commenced life, to sift and analyze evidence, they afford a better guarantee than ignorant men taken from a counter or a farm, for the correctness of the conclusions at which they may arrive in the discharge of their judicial functions. They have had generally ample opportunities of observing men and manners, and not unfrequently they are called upon to import their knowledge of the world, the doctrine of probabilities into their decisions. There is very often hard swearing on both sides, and the witnesses are found to a T quite *au fait* at their vocation. No amount of cross examination can break them down or expose the falsity of their statements; now what is the Judge to do under these circumstances? He proceeds now on the theory of probabilities which he finds to be a much safer guide than the conflicting testimonies of perjured witnesses. Can any juryman find his way to the truth through such contradictory evidence? Judges cannot afford to tell the jury in their charge to them that "this witness told a lie," or "that witness was to be believed" for that would be a misdirection. The jury are to decide upon the evidence that is offered before them, and it is no part of the business of the Judges to tell them what to believe or what not to believe. How can the jury, then, form a correct estimate of the evidence and come to a correct finding? And yet if these gentlemen pronounce a man to be "guilty" and another to be "not guilty," when they ought to have arrived at a diametrically opposite conclusion, their oracular response must be accepted as Gospel truth. The Judges,

in this predicament, are powerless for good or evil.

It is not an easy matter to mark aright the demeanour of a witness. None, but those who have been accustomed to the task of examining and cross-examining and re-examining witnesses, can detect the hireling or the tutored witness. Very often a *hem*, a *sidelong glance* or a *fling of the head*, &c., betrays the man. It is very often fraught with a significance which the trained Judge alone can read. Jury-men can never be expected to unravel the mystery.

The jury, besides, are liable to be unduly influenced by the eloquence of the advocate. Being generally shop-keepers, keranees, &c., they cannot be expected to have such a complete control over their feelings and passions as renders them proof against the artifices of Counsel. They are easily moved one way or the other. This much, however, cannot be predicated of the Judge who, having deliberately arrived at certain conclusions on the facts and evidence, cannot be persuaded to be shaken out of them, no matter what the amount of oratorical powers which an Advocate may bring to bear upon his client's case.

The lower orders of the people, from among whom jury-men are recruited, very often suffer their judgments to be warped by their prejudice against certain classes of the community, when those unfortunate classes happen to be arraigned in a Court of Justice. Railway Companies, for instance, can seldom enlist the sympathies of jurors. These latter are in general sure to return their verdict against them. On the other hand, we have known instances in Ireland of a Romanist Jury under certain circumstances acquitting Romanists and a Protestant Jury acquitting Protestants. A Judge is always above such prejudice or prepossession. His superior education is an infallible guarantee against such shameful conduct. Besides, his high position makes him "the observed of all observers." The maintenance of that position is with him an object of paramount importance, and this accordingly

imposes upon him the necessity of sacrificing his own private inclination at the shrine of duty. His reputation for uprightness and integrity of purpose is at stake, and no considerations can weigh with him in determining the question before him in any other way than what the evidence warrants.

We have thus briefly set before our readers the relative advantages and disadvantages of trials by the jury and the Judge without the assistance of jury or assessors. It remains for us now to see how the system of trial by jury, as it obtains here in the metropolis and in the Mofussil, is found to work in practice.

Now to begin with our Calcutta Petty Jury;—twelve gentlemen selected at random from among the shop-keepers, keranees, &c., form what is called the Petty Jury. In the hands of these are placed the fates of the prisoners, who happen to be arraigned before the Calcutta Sessions Court. What their capacities are for sifting and analyzing the evidence that is offered before them may be easily gathered from their antecedents. Cabinet-makers, shoe-makers and other Cossitolla gentry and writers in public offices, in the height of their ignorance of the law of evidence, are no more competent to form a correct estimate of the testimony than the gentleman who resides in the lunar sphere. And yet the verdict of these worthies decides the fates of all who have the good or bad fortune to be placed on the dock before them.

Then again, with reference to the theory of equality between the jurors and the prisoners, that is a myth—a mere fiction of law, where the former are drawn chiefly from among gentlemen who claim kith and kin with the dominant race and the latter happen to be of pure indigenous origin. The case however is different where the prisoners happen to be dressed in coats and pantaloons. Here the real or supposed equality between the jurymen and the accused is apparent, and that circumstance tends in no small measure to determine the ultimate verdict in the

case. We have already pointed out where the fallacy lurks in the theory. If the object of Criminal Law was to afford facilities of escape to the guilty, that object certainly was best secured by the provision made in the law, to wit, that no man was to be condemned unless by the verdict of twelve of his peers. But if it aimed at the dispensation of even-handed justice to all, we fear the proviso we have referred to was all but calculated to serve that end. Whatever might have been the necessity for its existence in the Statute Book of England in days gone by, when the unnecessary severity of the English Criminal Law was a standing reproach to the country, a justification cannot on any account be now pleaded on its behalf, when the circumstances which evoked it into being have wholly ceased to exist.

That the Jury system, as it exists in the Metropolis of British India, materially interferes with the dispensation of justice, is a proposition which no body will have the hardihood to deny. This result is due to the system as it obtains here. No particular person or persons are to blame for it. The theory of the system is radically wrong, and it is this theory that ought to be credited with all its shortcomings.

How is it, we ask, that Europeans charged with any criminal offence are seldom found "guilty," in spite of the unmistakeable nature of the charge by the Judge? The Judge cannot, of course, tell the jury what evidence to believe and what not to believe, but he does invariably point out to them the legal presumptions in the case, and the direction to which the probabilities point. If notwithstanding this, a verdict of "not guilty" should be returned, the Judge could on no account be held responsible for this result, nor do we think the jury either, for no body can compel them to compromise their own convictions. If we except the trial on account of the ice-house murder which resulted in the conviction of the American boy Very and that of the man Rudd

and one or two more such solitary trials, we do not remember a single instance in which a European charged with the murder or culpable homicide of a native was found "guilty." "A diseased spleen," or "a diseased liver" was invariably found to be the cause of the death, and in the case of Mr. Vigors, the *factum* of the death of a native was admitted, and although the trial resulted in that gentleman's acquittal, there was no enquiry as to what was the immediate cause of the death. This, certainly, is far from creditable to the system under which criminal justice is administered. Not the slightest imputation can attach to Mr. Vigors, as he was acquitted by the unanimous verdict of the jury, before which he was tried, nor to the jurors either, who could not be persuaded to believe the evidence by which the case for the prosecution was in their opinion attempted to be trumped up. But it is evident that somebody must have had a hand in the death which was admitted on all hands to have taken place, and we would accordingly recommend, that as it is not yet too late to trace the culprit, measures be at once adopted by the Government of Bengal to ferret him out; and we have not the least doubt but that the enquiry, if projected, cannot but be crowned with success.

Let us now turn to the Mofussil. Even there the jury-box presents no better spectacle; jury-men there are drawn generally from among the ragged gentry of the neighbourhood, who are as well remarkable for their ignorance as for their lack of a sense of justice or propriety. To be empanelled is regarded no mean honor. Bloated with an idea of their importance, they give themselves all manner of airs on the box. Would only they were competent!!! The evidence that is offered before them, they can not generally even understand, much less sift or analyze. They gape around and seem to be more anxious to make themselves seen there by their friends and neighbours, than to attend to the proceedings which are held before them. Their foreman, who happens to

be generally more knowing than the rest, is their "friend, philosopher and guide." They watch also the looks of Huzoor, to bask in the sunshine of whose smile is the height of their ambition. They imitate all his gestures. If he nods, they nod too, if he smiles, they smile, and if he frowns, they also knit their brows to express a similar emotion. Such is the constitution of the Mofussil jury-box.

The system has been in existence since about ten years, and we have not yet been able to perceive any sensible improvement in the administration of criminal justice. If the Judge goes wrong, they are sure to go wrong. But if he happens to be on the right scent, they oftentimes run counter and can on no account be prevailed upon to view things aright in their proper perspective.

We have been told of innumerable instances in which the gallows have been cheated of their dues, and this in spite of the repeated entreaties of the Judge to the Jury, begging them to retire again and reconsider their verdict. It is perhaps in the recollection of most of our readers how strongly Mr. Buckland, the Commissioner of the Burdwan Division, urged upon Government, not long ago, with reference to the palpable miscarriage of justice in a particular case in the district of Hooghly, the necessity or rather the expediency of doing away at once with the jury system in that district. This was not the only communication Government received on the subject. We understand that other competent authorities addressed similar protests, as occasion arose within their own jurisdictions.

We wonder how the Legislature was persuaded to re-enact with slight modifications the provisions of the old law in respect of the jury system in Act X of 1872. The system has been weighed in the balance and found to be wanting. It has failed to secure the desired end both here and in the Mofussil. By Act X of 1872 it has been provided that in the event of the Judge differing from the Jury, a reference is to be made to the

High Court, who are to decide the case according to the evidence on the record. We really fail to perceive the utility of this provision. Why not do away with the system altogether when it has been proved to be a failure? We have pointed out already that the system, as it obtains here, is radically wrong and rotten to the core. The people have more confidence in the learning and integrity of the Judges than in those of the Jury, and it is time therefore, we think, that the system should be at once done away with. That trial by jury is a farce at best, a mere mockery of justice; the sensible portion of even the English public has now thought fit to admit without any reservation, as the following extract from the *Times* clearly demonstrates:—

"A singular scene occurred at the Warwick Quarter Sessions on Friday afternoon between Sir J. Eardley Wilmot, the Recorder, and a petty jury. For a considerable time past the borough has been in a state of chronic excitement owing to several singular verdicts of "not guilty" having been returned by local juries in cases where the guilt of the prisoners has been considered indisputably clear; and recently the Town Council petitioned Government to abolish these Quarter Sessions on the ground that it was impossible to get justice administered. On Saturday, a man named Griffin, living in Warwickshire, was charged with a violent highway robbery on a man named Mooney, living at Leamington. He was caught in the act by a policeman who found the prosecutor's property in his possession. The prisoner told the policeman he knew he was done, and should plead guilty. The jury acquitted him. The Recorder characterized it as the clearest case of guilt he had ever had before him, and solemnly remonstrated with the jury for their verdict. He said, after this, he hoped the local authority would renew the attempt to get this Court of Quarter Sessions abolished, and promised all the assistance in his power to secure that desirable object."

This, no doubt, will at once bring to recollection of our readers the well-known case of Mr. Mana Mohan Ghose, Barister at Law, *versus* a policeman who had assaulted him, and who was pronounced by our precious jury of Cossitolla notoriety to be "Not Guilty." No comments are necessary.

It is time, therefore, we think, that the Legislature should invite the opinions of the Judges on the subject, and, with reference to such opinions and the general sense of the public at large, should at once proceed to adopt such measures as may be considered to be necessary to remove the stigma which has been suffered to attach so long to the administration of Criminal Justice in British India.

We hope, we may not be misunderstood. We have condemned the jury system on account of the abuses to which it has often been found to lead. We have said also that the system may be fairly dispensed with in England, and our reasons for this opinion are soon and easily told. English Judges being well trained in the laws, and being quite familiar with the manners and customs of their country, and sitting as they do in judgment over their own countrymen, may fairly be expected to form a correct estimate of the evidence that may be offered before them, and to apply the law to the facts found, with consummate skill and ability. A jury, under these circumstances so far from being useful to them contribute, as we have already pointed out, in a large number of cases to defeat the ends of justice. The Judges, therefore, if let alone, would discharge their duty much better than when the freedom of their action is clogged and hampered by a prejudiced and an ill-instructed agency. This much, however, can not be predicted of the majority of the Judges in this country. Not being duly instructed in the law, and being ignorant generally to a great extent of the social habits of the people over whom they sit in judgment, it is but reasonable to apprehend that in nine cases out of ten, justice should miscarry, unless they were assisted by a well-educated and

an honest jury. It was to guard against this contingency,—this failure of justice, that the Legislature thought fit in 1861 to introduce the system of trial by jury. The motive was laudable indeed. The end proposed was certainly desirable, but the means adopted were all but calculated to secure the ultimate object. Hence the failure as we have already pointed out. Is there then no remedy? We are of those that think that there is no evil without a remedy. We have only to find it out and the evil, we have no doubt, can not but be successfully grappled with at once.

The system that was called into existence by the Act of 1861 has been found to be not only utterly useless, but subversive, in many instances, of the ends of justice. We have no objection, therefore, to this system being done away with sans ceremony.

The provision made in Act X of 1872 for trial by jury appears to be equally useless. Of what practical use is a jury, if their verdict is not final? If, in case of a difference between the Judge and the jury, an appeal lies to the High Court, who are to decide the case on the evidence on the record, we really fail to perceive the utility of the institution unless it is regarded as a sort of blind to cajole the people with a mere semblance of the reality for which they appear to be so anxious.

So far as the circumstances of this country are concerned, we think that a jury of good men and true, *if properly selected*, cannot but render the most invaluable assistance to the Judges. The latter, belonging as they do invariably to the dominant race and being, as we have said already, quite unfamiliar with the social habits of the natives, and not being generally trained in the law, cannot be expected to decide a case rightly, unless they are assisted by well-educated native gentlemen, whose local knowledge especially qualifies them to form a correct opinion on the facts and evidence. The question then is, how to secure the co-operation of honest and well-educated native gentlemen in the

dispensation of criminal justice? The rules relating to the appointment of Jurors or Assessors in the Mofussil appear, so far as the theory is concerned, to be wholly unexceptionable. They are appended below:—

“The Collector of the district or other officer exercising the powers of a Collector of a district shall, from time to time, prepare and make out in alphabetical order, a list of persons residing within ten miles from the place where trials before the Court of Sessions are held, or within such other distance as the Local Government may think fit to direct who are, in the judgment of the Collector or other officer as aforesaid, qualified from their *education* and *character* to serve as Jurors or Assessors respectively. The list shall contain the name, place of abode, and quality or business of every such person.

“Copies of such list shall be stuck up in the office of the Collector or other officer as aforesaid and in the court house of the Magistrate of the district and of the chief Civil Court, and in some conspicuous place in the town or towns near or in the vicinity of which the persons named in the list shall reside, and every such copy shall have subjoined to it a notice, stating that objections to the list will be heard and determined by the Collector or other officer as aforesaid at a time and place to be mentioned in the notice.

“The Collector or other officer as aforesaid shall, at the time and place mentioned in the notice, revise the list and hear the objections, if any, of persons interested in the amendment thereof, and shall strike out the name of any person not qualified in his judgment to serve as a Juror or an Assessor, and insert the name of any person omitted therefrom, whom he deems qualified for such service. A copy of the revised list shall be signed by the Collector or other officer as aforesaid, and transmitted to the Court of Sessions. Any order of the Collector or other officer as aforesaid in preparing and revising the list shall be final.

"The list so prepared and revised shall be again revised at least once in every year, and the list so revised shall be deemed a new list and shall be subject to all the rules hereinbefore contained as to the list originally prepared.

"Except as hereinbefore provided, all male persons between the ages of twenty-one and sixty, resident within the limits of the jurisdiction of the Court of Sessions, shall be deemed capable of serving as Jurors or Assessors, and shall be liable to be summoned accordingly.

"The following persons are incapable of serving as Jurors or as Assessors in trials before the Court of Sessions, namely:—

"1. Persons who hold any office in or under the said Court.

"2. Persons executing any duties or entrusted with any police functions.

"3. Persons who have been convicted of any offence against the State, or of any fraudulent or other offence which, in the judgment of the Collectors, renders them unfit to serve on the jury.

"4. Persons who are afflicted with any infirmity of body or mind, sufficient to incapacitate them from serving.

"5. Persons who, by habit or religious vows, have relinquished all care of worldly affairs.

Now no body can find fault with these rules. Theoretically they appear to be well calculated to secure the desired end, but in practice they have been found to be wanting. The fact is, the Collector's Nazir has generally the duty of preparing the lists referred to, entrusted to him, and if that gentleman's good will is secured, one may safely calculate upon his exemption from service on the jury. The names of those only are returned and those only are pressed into actual service who cannot afford to satisfy this worthy of their non-liability. These are generally worthless people; and it is absurd to expect that the Court can derive any material assistance from them.

The only modification in the rules that we would recommend is that none but those who have received an English education be eligible for service on the

jury. There is no lack of such gentlemen in the country. The school-master has been abroad with a vengeance. He has penetrated even into the wilds of Assam and the hills and jungles of Tipperah and Chittagong. We may therefore safely make a knowledge of English a *sine qua non* for service on the jury, and if this rule were strictly followed out, we think much of the evil now complained of would disappear. English speaking Vakeels of the district Courts and school-masters have been found to answer remarkably well as Jurors or Assessors, why not then employ these gentlemen on the jury as occasion arises, if others equally qualified cannot be had? We would only recommend that every independent person, *i. e.* not in Government service, employed on the jury, do get a fair remuneration for his trouble, varying from Rs. five to ten per diem, at the discretion of the Judge. This will really act as a charm in removing the disinclination and apathy now manifested by many of the gentlemen who, under the rules in force, are eligible for service on the jury. Justice also requires that every person who is made to work should have a proper compensation for his labour. Certainly our proposition will entail an additional expense, but this may be met from what is called the "Fine Fund."

With reference to the Calcutta Jury, if the institution is to be still continued, our opinion is that in every case in which a native happens to be implicated, at least half the number of jurors ought to be natives, selected from what is called "the educated class." The "pay scheme" ought to be adopted here also.

We do not say that our recipe is infallible. All that we maintain is, that it ought to have a fair trial, and if after such trial it is found not to answer, it ought certainly to give place to some other mode of treatment which may *prima facie* be expected to be an improvement upon the present system.



*Rules of the High Court, dated 27th January 1872—Application for the admission of Special Appeals.*

On the 19th of December 1870 the High Court passed the following Rule:—

"From and after the opening of the Court on the fourth day of January 1871, all applications for the admission of special appeals shall be presented in open Court."

In continuation of this rule, certain other rules laying down details of the mode in which applications for the admission of special appeals were to be made, were passed on the 28th of March 1871.

These rules were subsequently found to be defective, and in modification of them certain other rules were passed on the subject, Rule 5 whereof provides:—

"That such (*i. e.* special appeal) applications may be admitted by a single Judge, but none shall be rejected otherwise than by a Division Court."

And accordingly it has been the practice since January 1871 not to admit any special appeal, unless it was proved to the satisfaction of a Judge or of a Division Court, that the decision of the Lower Appellate Court was wrong in a point of law. If no such error in law is made out, the special appeal is rejected, but if the application is made before a single Judge and he considers the decision of the Lower Appellate Court to be sound in law, he reserves the special appeal to be disposed of by a Division Court. The application is accordingly renewed before such Division Court as may be appointed for the purpose, where, after a lengthened argument, if the Judges consider the grounds taken in the petition of special appeal to be good and duly substantiated, the appeal is admitted, that is registered and numbered and brought on the file of the Court, otherwise it is rejected at once *ex parte*.

What the legal sanction is for this mode of procedure, we are not exactly aware. Certainly the High Court has

power to make rules in matters of detail for its own guidance, as well as that of the Subordinate Courts, but the question is, whether the rules under notice come within this category.

The law relating to the admission or rejection of special appeals is to be found in Section 25 Act XXIII of 1861. That Section runs thus:—

"If the application for the admission of a special appeal be not written on a stamped-paper of the prescribed value, or if it be not drawn up in the manner laid down in Section 374 of Act VIII of 1859, or if it do not state any ground on which a special appeal will lie under the provisions of Section 372 of the said Act, the Court may reject the application, or may return it to the party for the purpose of being corrected. The order for rejecting the application or for returning it to the party may be passed by a single Judge of the Court. When the application is correctly drawn up, it shall be registered in a book to be kept for that purpose, which shall be in the form contained in the Schedule D of the said Act; and the case shall proceed in all other respects as a regular appeal, and shall be subject to all the rules hereinbefore provided for such appeals, so far as the same may be applicable."

It is evident that this Section has reference to the form only in which petitions of special appeal are to be drawn. If the petitions do not state any ground on which a special appeal will lie, that is, a ground embodying a point of law or shewing a defect in the investigation of the case which has affected the decision thereof on the merits, the Court may reject the petition or return it to the party or his Vakeel for the necessary corrections being made. One Judge may exercise the powers of rejecting or returning the petition under the circumstances hereinbefore set forth. But, if the petition is correctly drawn up, it shall be registered, and the case shall proceed as a regular appeal in other respects.

There can be no doubt from the language used in Section 25, Act XXIII



of 1861, that what the Legislature intended was, that in every instance in which a petition of special appeal did not state any grounds on which a special appeal would lie under Section 372 of the Code of Civil Procedure, a single Judge of the High Court was competent to reject such petition or return it for the purpose of being corrected. The power could only be exercised when the petition of special appeal did not exhibit any grounds under which such appeal would lie under the law and under no other circumstances. But, if the grounds set forth in the petition appeared *prima facie* to be grounds of special appeal under the law, there was no other alternative left to the Court than to admit the appeal, irrespective of the question whether the grounds stated in the petition legitimately arose in the cause, or whether they could be made good or otherwise in the argument at the hearing. If, in the words used in the Section, the petition was correctly drawn up, it must be registered, and then the case must proceed as a regular appeal in other respects. The Legislature never contemplated a preliminary hearing before registration and service of summons, and a second hearing after the respondent had appeared, or, at all events, after summons had been duly served, and yet under the rules of the High Court under notice, a necessity has arisen of giving two hearings to every special appeal which happens to be admitted.

It is clear that, if a petition of special appeal is correctly drawn up, that is, states such grounds as come under the purview of Section 372 of Act VIII of 1859, it ought to be at once admitted without any reference to the question whether such grounds can be substantiated or whether they arise directly from the decision arrived at by the Lower Appellate Court. That is a matter which ought to be determined at the hearing in the presence of the respondent, or if he does not appear, after he has been duly served with notice. At all events the Legislature never contemplated that the Court should sift the grounds of every special

appeal in the first instance before admitting it,—care being taken that none should be admitted or registered but such as were fit to be decreed or remanded for a fresh decision to the Lower Court.

Thus it does not appear that the rules in question are in strict keeping with the letter and the spirit of the law, although the motive which appears to have weighed with the Court in passing them must be conceded on all hands to be highly laudable. Evidently, from an intense anxiety to prevent unnecessary litigation, the Court thought it fit to impose some sort of restriction upon the practice, which obtained at the time when the rules were passed, of admitting every special appeal that was filed. Unfortunately, however, the restrictions do not appear to be of the kind contemplated by the Legislature. If one Judge examined the grounds of special appeal in every case that was put in, and admitted, rejected, or returned the petitions according as he found the grounds to be in conformity or otherwise with the provisions of Section 372 Act VIII of 1859, we think the ends of justice would be fully answered, and answered too in the most approved legal style. All that is required is to follow strictly the provisions of Section 25, Act XXIII of 1861, and we have not the slightest doubt but that the object of the rules under notice will be fully secured without much ado.

We are free to admit that in passing the rules we are speaking of, the Court was influenced by the best of motives; the end proposed was certainly very desirable; but the end does not always justify the means. We are afraid the rules are too stringent, and the result is, that they have overshot the mark.

In connection with the subject mooted here, there are some points to which we think it necessary to advert, irrespective of the question of the strict legality or otherwise of the rules referred to.

What strikes us in the first place, as an anomaly, is the necessity of a certificate by an advocate in every petition of special appeal. Considering the searching

scrutiny made by the Judges into the grounds of special appeal before admitting a petition, we think the certificate, which every advocate that files a special appeal is now obliged to record and attest with his signature, may be fairly dispensed with. A certificate of the required description would certainly be necessary, if petitions of special appeal were admitted without any reservation, as was the practice before the rules under comment were passed. Some sort of guarantee was, to be sure, required that the grounds upon which petitions of special appeal were based were such as the law prescribed, and under the old practice the certificate of the vakeel or advocate afforded such guarantee. The present system, however, of presenting petitions of special appeal in open Court does not seem to call for any certificates at all by the advocates. Special appeals are now fairly argued before Division Benches before they are registered or admitted, and if they are admitted after what may be properly called "a hearing," no responsibility ought to attach to the advocates or Vakeels for putting them in.

They are not admitted upon the mere certificate of an advocate; therefore where is the necessity, or value either, of such a certificate. The cases have to be argued before the Judges preliminary to their registration, and as it is by order of the Judges that they are registered, if any certificate was necessary to be recorded, it must be so recorded by the Judges themselves as was the practice before Act VIII of 1859 came into operation. If the advocate's certificate was worth any thing, there would be no necessity for a lengthened argument before the Judges prior to their registration. If they were admitted upon the authority of such certificates only, certainly the gentlemen subscribing such certificates ought to be held responsible, if the special appeals so certified happened to be frivolous or vexatious or otherwise objectionable. But as they are now admitted after a full hearing by the Judges, we think that certificates by

advocates or Vakeels are not at all necessary.

The question to which we would next draw attention is one of stamps. The applications, as they are called, for the admission of special appeals, have now to be made before the Courts by way of motion. Now, the petitions or memoranda of special appeal are engrossed on such stamps as cover the value at which the appeals are laid. As after the preliminary hearing which is now necessary by the rules under notice, they may be either rejected or admitted at the discretion of the Judges, and as the *applications* we have referred to are presented by way of motion only, we are not quite sure whether such applications may not be legally engrossed on two Rupee stamps. These applications cannot be properly called, under the circumstances which we have detailed above, memoranda or petitions of special appeal, and therefore we do not think that it is at all necessary that they should bear an *ad valorem* stamp calculated according to the value of the appeal. The High Court is certainly competent to entertain these applications on two Rupee stamps like ordinary petitions, and if the Court is satisfied that the grounds of appeal as set forth therein are sufficiently good in law, they may afterwards be engrossed on stamps of the prescribed value and filed in the office for registration; but if there appear to be no good grounds for impugning the legality of the decision of the Lower Appellate Court, the application may be rejected. As there is no law which enjoins that these *applications*, which must be made preliminary to the admission or rejection of special appeals, should be engrossed on full stamps, there can be no question about the competency of the High Court to treat them as ordinary petitions.

Besides, we do not quite understand how those applications, which are rejected, may be strictly called memoranda or petitions of *special appeal* when they are not even *registered and numbered* as such. If they are not brought on

the file of the Court and duly numbered, they cannot be called special appeals, and if they are not special appeals before they are admitted as such, we do not exactly see the necessity of having these applications, which are only for the admission of special appeals, engrossed on full stamps. They are only *petitions praying for leave to put in* memoranda of special appeal, and consequently they ought not to be written on paper of higher value than two Rupees—the stamp prescribed for petitions to the High Court. If the permission sought is granted, petitions of special appeal duly engrossed on proper stamp ought to be filed in the office, but if the permission is withheld, the fortunate or unfortunate suitor,—we do not know exactly how to describe him—, ought not to be saddled with the cost of stamp paper in respect of an appeal which he is not allowed to put in. The present practice, therefore, of requiring memoranda of special appeal to be engrossed on full stamps and then rejecting those which do not appear to be supported by strong grounds of law, entails upon the parties whose applications are thus thrown out, an unnecessary expense. This the High Court can easily obviate. We would accordingly recommend, in the event of the rules under notice being continued in force, that all applications for the admission of special appeals be received on two rupee stamps only, and that if after argument any cases are found to involve questions of law which the Lower Appellate Courts have determined erroneously, the same may be ordered to be admitted on full stamp duly being paid. This will, to a certain extent, affect the income now derived from the sale of judicial stamps, but that is a matter about which Courts of Justice ought never to trouble their heads.

We do not exactly see the necessity of the rules we are speaking of. It is certainly desirable to put a stop to unnecessary and vexatious litigation, but we fail to see how these rules are calculated to compass that end. Many original suits and regular appeals both here and in the Mofussil, as in every other country, are found to be no less frivolous and vexatious than some special appeals, but how can we absolutely shut the door against them. Bengalees are neither more nor less litigious than any other people, and therefore we do not think that any special legislation is necessary to restrain their so-called litigious propensity. All that can be done to discourage such litigation is to saddle the troublesome suitors with heavy costs. Why not follow the same rule in respect of utterly groundless special appeals? If the Court made it a rule to dismiss every bad special appeal with costs varying from Rs. 50 to Rs. 100, we have little doubt but that this rule would prove much more efficacious in securing the end desired than the present practice. Under it every special respondent that was unnecessarily dragged before the High Court would have a fair remuneration in the shape of his costs, and every person that wished to prefer a special appeal would pause and think twice over, before he rushed head-long to incur such heavy expense. Thus, by the operation of the rule we have proposed, the Court will be spared the necessity of wasting such a large portion of its time, as it does at present, in carrying out the rules under comment. We have seen Division Benches sitting from day to day hearing applications for the admission of special appeals, and wondered how this practice has been suffered to continue so long. The spectacle is far from edifying. We have had enough of it, and it is already, we think, high time that the rules should be abrogated at once.

(b) A produces deeds relating to landed property of which he is the mortgagee. The mortgagor is in possession. The custody is proper.

(c) A, a connection of B, produces deeds relating to lands in B's possession, which were deposited with him by B for safe custody. The custody is proper.

#### CHAPTER VI—OF THE EXCLUSION OF ORAL BY DOCUMENTARY EVIDENCE.

91. When the terms of a contract,\* or of a grant, or of any other disposition of property, have been reduced to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of such contract, grant or other disposition of property, or of such matter, except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions hereinafter contained.

*Exception 1.*—When a public officer is required by law to be appointed in writing, and when it is shown that any particular person has acted as such officer, the writing by which he is appointed need not be proved.

*Exception 2.*—Wills under the Indian Succession Act may be proved by the Probate.

*Explanation 1.*—This Section applies equally to cases in which the contracts, grants or disposition of property referred to are contained in one document, and to cases in which they are contained in more documents than one.

*Explanation 2.*—Where there are more originals than one, one original only need be proved.

*Explanation 3.*—The statement in any document whatever of a fact other than the facts referred to in this Section, shall not preclude the admission of oral evidence as to the same fact.

#### Illustrations.

(a) If a contract be contained in several letters, all the letters in which it is contained must be proved.

(b) If a contract is contained in a bill of exchange, the bill of exchange must be proved.

(c) If a bill of exchange is drawn in a set of three, one only need be proved.

(d) A contracts in writing with B for the delivery of indigo upon certain terms. The contract mentions the fact that B had paid A the price of other indigo contracted for verbally on another occasion. Oral evidence is offered that no payment was made for the other indigo. The evidence is admissible.

(e) A gives B a receipt for money paid by B. Oral evidence is offered of the payment. The evidence is admissible.

92. When the terms of any such contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to the last Section, no evidence of any oral agreement or statement shall be admitted as between the parties to any such instrument or their representatives in interest, for the purpose of contradicting, varying, adding to, or subtracting from, its terms.

*Proviso (1).*—Any fact may be proved which would invalidate any document, or which would entitle any person to any decree or order relating thereto; such as fraud, intimidation, illegality, want of due execution, want of capacity in any contracting party, want or failure of consideration, or mistake in fact or law.

*Proviso (2).*—The existence of any separate oral agreement as to any matter on which a document is silent and which is not inconsistent with its terms, may be proved. In considering whether or not this proviso applies, the Court shall have regard to the degree of formality of the document.

*Proviso (3).*—The existence of any separate oral agreement constituting a condition precedent to the attaching of any obligation under any such contract, grant or disposition of property, may be proved.

*Proviso (4).*—The existence of any distinct subsequent oral agreement to rescind or modify any such contract, grant or disposition of property, may be proved, except in cases in which such contract, grant or disposition of property is by law required to be in writing, or has been registered according to the law in force for the time being as to the registration of documents.

*Proviso (5).*—Any usage or custom by which incidents, not expressly mentioned in any contract, are usually annexed to contracts of that description, may be proved: Provided that the annexing of such incident would not be repugnant to, or inconsistent with, the express terms of the contract.

*Proviso (6).*—Any fact may be proved which shows in what manner the language of a document is related to existing facts.

*Illustrations.*

(a) A policy of insurance is effected on goods "in ships from Calcutta to London." The goods are shipped in a particular ship which is lost. The fact that that particular ship was orally excepted from the policy, cannot be proved.

(b) A agrees absolutely in writing to pay B Rs. 1,000 on the 1st March 1873. The fact that, at the same time, an oral agreement was made that the money should not be paid till the 31st March, cannot be proved.

(c) An estate called 'the Rampore Tea Estate' is sold by a deed which contains a map of the property sold. The fact that land not included in the map had always been regarded as part of the estate and was meant to pass by the deed, cannot be proved.

(d) A enters into a written contract with B to work certain mines, the property of B, upon certain terms. A was induced to do so by a misrepresentation of B's as to their value. This fact may be proved.

(e) A institutes a suit against B for the specific performance of a contract, and also prays that the contract may be reformed as to one of its provisions, as that provision was inserted in it by mistake. A may prove that such a mistake was made as would by law entitle him to have the contract reformed.

(f) A orders goods of B by a letter in which nothing is said as to the time of payment, and accepts the goods on delivery. B sues A for the price. A may show that the goods were supplied on credit for a term still unexpired.

(g) A sells B a horse and verbally warrants him sound. A gives B a paper in these words: 'Bought of A a horse for Rs. 500.' B may prove the verbal warranty.

(h) A hires lodgings of B, and gives B a card on which is written—'Rooms, Rs. 200 a month.' A may prove a verbal agreement that these terms were to include partial board.

A hires lodgings of B for a year, and a regularly stamped agreement drawn up by an attorney is made between them. It is silent on the subject of board. A may not prove that board was included in the terms verbally.

(i) A applies to B for a debt due to A by sending a receipt for the money. B keeps the receipt and does not send the money. In a suit for the amount, A may prove this.

(j) A and B make a contract in writing to take effect upon the happening of a certain contingency. The writing is left with B, who sues A upon it. A may show the circumstances under which it was delivered.

### 93. When the language used in a document is, on its face, ambiguous or defective, evidence

Exclusion of evidence to explain or amend ambiguous document.

may not be given of facts which would show its meaning or supply its defects.

*Illustrations.*

(a) A agrees in writing to sell a horse to B for Rs. 1,000 or Rs. 1,500.

\* Evidence cannot be given to show which price was to be given.

(b) A deed contains blanks. Evidence cannot be given of facts which would show how they were meant to be filled.

### 94. When language used in a document is plain in itself, and when

Exclusion of evidence against application of document to existing facts.

it applies accurately to existing facts, evidence may not be given to show that it was not meant to apply to such facts.

*Illustration.*

A sells to B by deed 'my estate at Rampore' containing 100 bigds.' A has an estate at Rampore containing 100 bigds. Evidence may not be given of the fact that the estate meant to be sold was one situated at a different place and of a different size.

### 95. When language used in a document is plain in itself, but is un-

Evidence as to document unmeaning in reference to existing facts.

meaning in reference to existing facts, evidence may be given to show that it was used in a peculiar sense.

*Illustration.*

A sells to B by deed 'my house in Calcutta.'

A had no house in Calcutta, but it appears that he had a house at Howrah, of which B had been in possession since the execution of the deed.

These facts may be proved to show that the deed related to the house at Howrah.

### 96. When the facts are such that the language used might have

Evidence as to application of language which can apply to one only of several persons.

been meant to apply to any one, and could not have been meant to apply to more than one, of several persons or things, evidence may be given of facts which show which of those persons or things it was intended to apply to.

*Illustrations.*

(a) A agrees to sell to B for Rs. 1,000 "my white horse." A has two white horses. Evidence may be given of facts which show which of them was meant.

(b) A agrees to accompany B to Hyderabad. Evidence may be given of facts showing whether Hyderabad in the Deccan or Hyderabad in Scind was meant.

### 97. When the language used applies

Evidence as to application of language to one of two sets of facts to neither of which the whole correctly applies.

partly to one set of existing facts, and partly to another set of existing facts, but the whole of it does not apply correctly to either, evidence may be given to show to which of the two it was meant to apply.

*Illustration.*

A agrees to sell to B 'my land at X' in the occupation of Y. A has land at X, but not in the occupation of Y, and he has land in the occupation of Y, but it is not at X. Evidence may be given of facts showing which he meant to sell.

98. Evidence may be given to show the meaning of illegible or not commonly intelligible characters, of foreign, obsolete, technical, local, and provincial expressions, of abbreviations and of words used in a peculiar sense.

Evidence as to meaning of illegible characters, &c.

*Illustration.*

\* A, a sculptor, agrees to sell to B 'all my mods.' A has both models and modelling tools. Evidence may be given to show which he meant to sell.

99. Persons who are not parties to a document, or their representatives in interest, may give evidence of any facts tending to show a contemporaneous agreement varying the terms of the document.

Who may give evidence of agreement varying terms of document.

*Illustration.*

A and B make a contract in writing that B shall sell A certain cotton, to be paid for on delivery. At the same time they make an oral agreement that three months' credit shall be given to A. This could not be shown as between A and B, but it might be shown by C if it affected his interests.

100. Nothing in this Chapter contained shall be taken to affect any of the provisions of the Indian Succession Act (X of 1865) as to the construction of wills.

Saving of provisions of Indian Succession Act relating to wills.

## PART III.

## PRODUCTION AND EFFECT OF EVIDENCE.

## CHAPTER VII.—OF THE BURDEN OF PROOF.

101. Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist.

When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.

*Illustrations.*

(a) A desires a Court to give judgment that B shall be punished for a crime which A says B has committed.

A must prove that B has committed the crime.

(b) A desires a Court to give judgment that he is entitled to certain land in the possession of B by reason of facts which he asserts and which B denies to be true.

A must prove the existence of those facts.

102. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

On whom burden of proof lies.

*Illustrations.*

(a) A sues B for land of which B is in possession, and which, as A asserts, was left to A by the will of C, B's father.

If no evidence were given on either side, B would be entitled to retain his possession.

Therefore the burden of proof is on A.

(b) A sues B for money due on a bond.

The execution of the bond is admitted, but B says that it was obtained by fraud, which A denies.

If no evidence were given on either side, A would succeed, as the bond is not disputed and the fraud is not proved.

Therefore the burden of proof is on B.

103. The burden of proof as to any particular fact lies on that person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

Burden of proof as to particular fact.

*Illustration.*

(a) A prosecutes B for theft, and wishes the Court to believe that B admitted the theft to C. A must prove the admission.

B wishes the Court to believe that, at the time in question, he was elsewhere. He must prove it.

104. The burden of proving any fact necessary to be proved in order to enable any person to give evidence of any other fact is on the person who wishes to give such evidence.

Burden of proving fact to be proved to make evidence admissible.

*Illustrations.*

(a) A wishes to prove a dying declaration by B. A must prove B's death.

(b) A wishes to prove, by secondary evidence, the contents of a lost document.

A must prove that the document has been lost.

105. When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any of the General Exceptions in the Indian Penal Code, or within any special exception or proviso contained in any other part of the same Code, or in any law defining the offence, is upon

Burden of proving that case of accused comes within exceptions.

him, and the Court shall presume the absence of such circumstances.

*Illustrations.*

(a) A, accused of murder, alleges that, by reason of unsoundness of mind, he did not know the nature of the act.

The burden of proof is on A.

(b) A, accused of murder, alleges that, by grave and sudden provocation, he was deprived of the power of self-control.

The burden of proof is on A.

(c) Section three hundred and twenty-five of the Indian Penal Code provides that whoever, except in the case provided for by Section three hundred and thirty-five, voluntarily causes grievous hurt, shall be subject to certain punishments.

A is charged with voluntarily causing grievous hurt under Section three hundred and twenty-five.

The burden of proving the circumstances bringing the case under Section three hundred and thirty-five lies on A.

106. When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him.

Burden of proving fact especially within knowledge.

*Illustrations.*

(a) When a person does an act with some intention other than that which the character and circumstances of the act suggest, the burden of proving that intention is upon him.

(b) A is charged with travelling on a railway without a ticket. The burden of proving that he had a ticket is on him.

107. When the question is whether a man is alive or dead, and it is shown that he was alive within thirty years, the burden of proving that he is dead is on the person who affirms it.

Burden of proving death of person known to have been alive within thirty years.

108. When the question is whether a man is alive or dead, and it is proved that he has not been heard of for seven years by those who would naturally have heard of him if he had been alive, the burden of proving that he is alive is on the person who affirms it.

Burden of proving that person is alive who has not been heard of for seven years.

109. When the question is whether persons are partners, landlord and tenant, or principal and agent, and it has been shown that they have been acting as such, the burden of proving that they do not stand, or have ceased to stand, to each other in those relationships respectively, is on the person who affirms it.

Burden of proof as to partnership, tenancy and agency.

110. When the question is whether any person is owner of anything of which he is shown to be in possession, the burden of proving that he is not the owner is on the person who affirms that he is not the owner.

Burden of proof as to ownership.

111. Where there is a question as to the good faith of a transaction between parties, one of whom stands to the other in a position of active confidence, the burden of proving the good faith of the transaction is on the party who is in a position of active confidence.

Proof of good faith in transactions where one party is in relation of active confidence.

*Illustrations.*

(a) The good faith of a sale by a client to an attorney is in question in a suit brought by the client. The burden of proving the good faith of the transaction is on the attorney.

(b) The good faith of a sale by a son just come of age to a father is in question in a suit brought by the son. The burden of proving the good faith of the transaction is on the father.

112. The fact that any person was born during the continuance of a valid marriage between his mother and any man, or within two hundred and eighty days after its dissolution, the mother remaining unmarried, shall be conclusive proof that he is the legitimate son of that man, unless it can be shown that the parties to the marriage had no access to each other at any time when he could have been begotten.

Birth during marriage, conclusive proof of legitimacy.

113. A notification in the *Gazette of India* that any portion of British territory has been ceded to any Native State, Prince or Ruler, shall be conclusive proof that a valid cession of such territory took place at the date mentioned in such notification.

Proof of cession of territory.

114. The Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business in their relation to the facts of the particular case.

Court may presume existence of certain facts.

*Illustrations.*

The Court may presume—

(a) That a man who is in possession of stolen goods soon after the theft is either the thief or has received the goods knowing them to be stolen, unless he can account for his possession;



(b) That an accomplice is unworthy of credit, unless he is corroborated in material particulars ;

(c) That a bill of exchange, accepted or endorsed, was accepted or endorsed, for good consideration ;

(d) That a thing or state of things which has been shown to be in existence within a period shorter than that within which such things or states of things usually cease to exist, is still in existence ;

(e) That judicial and official acts have been regularly performed ;

(f) That the common course of business has been followed in particular cases ;

(g) That evidence which could be and is not produced would, if produced, be unfavourable to the person who withholds it ;

(h) That if a man refuses to answer a question which he is not compelled to answer by law, the answer, if given, would be unfavourable to him ;

(i) That when a document creating an obligation is in the hands of the obligor, the obligation has been discharged.

But the Court shall also have regard to such facts as the following, in considering whether such maxims do or do not apply to the particular case before them :—

As to illustration (a)—A shop-keeper has in his till marked rupees soon after it was stolen, and cannot account for its possession specifically, but is continually receiving rupees in the course of his business :

As to illustration (b)—A, a person of the highest character, is tried for causing a man's death by an act of negligence in arranging certain machinery. B, a person of equally good character who also took part in the arrangement, describes precisely what was done, and admits and explains the common carelessness of A and himself :

As to illustration (b)—A crime is committed by several persons. A, B and C, three of the criminals, are captured on the spot and kept apart from each other. Each gives an account of the crime implicating D, and the accounts corroborate each other in such a manner as to render previous concert highly improbable :

As to illustration (c)—A, the drawer of a bill of exchange, was a man of business. B, the acceptor, was a young and ignorant person, completely under A's influence :

As to illustration (d)—It is proved that a river ran in a certain course five years ago, but it is known that there have been floods since that time which might change its course :

As to illustration (e)—A judicial act, the regularity of which is in question, was performed under exceptional circumstances :

As to illustration (f)—The question is, whether a letter was received. It is shown to have been posted, but the usual course of the post was interrupted by disturbances :

As to illustration (g)—A man refuses to produce a document which would bear on a contract of small importance on which he is sued, but which might also injure the feelings and reputation of his family :

As to illustration (h)—A man refuses to answer a question which he is not compelled by law to answer, but the answer to it might cause loss to him in matters unconnected with the matter in relation to which it is asked :

As to illustration (i)—A bond is in possession of the obligor, but the circumstances of the case are such that he may have stolen it.

## CHAPTER VIII.—ESTOPPEL.

115. When one person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed in any suit or proceeding between himself and such person or his representative to deny the truth of that thing.

### Illustration.

A intentionally and falsely leads B to believe that certain land belongs to A, and thereby induces B to buy and pay for it.

The land afterwards becomes the property of A, and A seeks to set aside the sale on the ground that, at the time of the sale, he had no title. He must not be allowed to prove his want of title.

116. No tenant of immoveable property, or person claiming through such tenant, shall, during the continuance of the tenancy, be permitted to deny that the landlord of such tenant had, at the beginning of the tenancy, a title to such immoveable property ; and no person who came upon any immoveable property by the license of the person in possession thereof, shall be permitted to deny that such person had a title to such possession at the time when such license was given.

117. No acceptor of a bill of exchange shall be permitted to deny that the drawer had authority to draw such bill or to endorse it, nor shall any bailee or licensee be permitted to deny that his bailor or licensor had, at the time when the bailment or license commenced, authority to make such bailment or grant such license.

*Explanation (1).*—The acceptor of a bill of exchange may deny that the bill was really drawn by the person by whom it purports to have been drawn.

*Explanation (2).*—If a bailee delivers the goods bailed to a person other than the bailor, he may prove that such person had a right to them as against the bailor.

## CHAPTER IX.

## OF WITNESSES.

118. All persons shall be competent to testify unless the Court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease, whether of body or mind, or any other cause of the same kind.

*Explanation.*—A lunatic is not incompetent to testify unless he is prevented by his lunacy from understanding the questions put to him and giving rational answers to them.

119. A witness who is unable to speak may give his evidence in any other manner in which he can make it intelligible, as by writing or by signs; but such writing must be written and the signs made in open Court. Evidence so given shall be deemed to be oral evidence.

120. In all civil proceedings the parties to the suit, and the husband or wife of any party to the suit shall be competent witnesses. In criminal proceedings against any person, the husband or wife of such person, respectively, shall be a competent witness.

121. No Judge or Magistrate shall, except upon the special order of some Court to which he is subordinate, be compelled to answer any questions as to his own conduct in Court as such Judge or Magistrate, or as to anything which came to his knowledge in Court as such Judge or Magistrate; but he may be examined as to other matters which occurred in his presence whilst he was so acting.

*Illustrations.*

(a) A, on his trial before the Court of Session, says that a deposition was improperly taken by B, the Magistrate. B cannot be compelled to answer questions as to this, except upon the special order of a Superior Court.

(b) A is accused before the Court of Session of having given false evidence before B, a Magistrate. B cannot be asked what A said, except upon the special order of the Superior Court.

(c) A is accused before the Court of Session of attempting to murder a Police officer whilst on his trial before B, a Sessions Judge. B may be examined as to what occurred.

122. No person who is or has been married, shall be compelled to disclose any communication made to him during marriage by any person to whom he is or has been married; nor shall he be permitted to disclose any such communication, unless the person who made it, or his representative in interest, consents, except in suits between married persons, or proceedings in which one married person is prosecuted for any crime committed against the other.

123. No one shall be permitted to give any evidence derived from unpublished official records relating to any affairs of State, except with the permission of the officer at the head of the department concerned, who shall give or withhold such permission as he thinks fit.

124. No public officer shall be compelled to disclose communications made to him in official confidence, when he considers that the public interests would suffer by the disclosure.

125. No Magistrate or police officer shall be compelled to say whence he got any information as to the commission of any offence.

126. No barrister, attorney, pleader or vakil, shall at any time be permitted, unless with his client's express consent, to disclose any communication made to him in the course and for the purpose of his employment as such barrister, pleader, attorney or vakil by or on behalf of his client, or to state the contents or condition of any document with which he has become acquainted in the course and for the purpose of his professional employment, or to disclose any advice given by him to his client in the course and for the purpose of such employment:

Provided that nothing in this Section shall protect from disclosure—

(1) Any such communication made in furtherance of any criminal purpose;

(2) Any fact observed by any barrister, pleader, attorney or vakil in the course of his employment as such showing that any crime or fraud has been committed since the commencement of his employment.

It is immaterial whether the attention of such barrister, attorney or vakil was or was not directed to such fact by or on behalf of his client.

*Explanation.*—The obligation stated in this section continues after the employment has ceased.

*Illustrations.*

(a) A, a client, says to B, an attorney,—‘I have committed forgery, and I wish you to defend me.’

As the defence of a man known to be guilty is not a criminal purpose, this communication is protected from disclosure.

(b) A, a client, says to B, an attorney,—‘I wish to obtain possession of property by the use of a forged deed on which I request you to sue.’

This communication, being made in furtherance of a criminal purpose, is not protected from disclosure.

(c) A, being charged with embezzlement, retains B, an attorney, to defend him. In the course of the proceedings, B observes that an entry has been made in A’s account-book charging A with the sum said to have been embezzled, which entry was not in the book at the commencement of his employment.

This being a fact observed by B in the course of his employment showing that a fraud has been committed since the commencement of the proceedings, it is not protected from disclosure.

127. The provisions of section one hundred and twenty-six shall apply to interpreters, and the clerks or servants of barristers, pleaders, attorneys and vakils.

Section 126 to apply to interpreters, &c.

128. If any party to a suit gives evidence therein at his own instance or otherwise, he shall not be deemed to have consented thereby to such disclosure as is mentioned in section one hundred and twenty-six; and if any party to a suit or proceeding calls any such barrister, attorney or vakil as a witness, he shall be deemed to have consented to such disclosure only if he questions such barrister, attorney or vakil on matters which, but for such question, he would not be at liberty to disclose.

Privilege not waived by volunteering evidence.

129. No one shall be compelled to disclose to the Court any confidential communication which has taken place between him and his legal professional adviser, unless he offers himself as a witness, in which case he may be compelled to disclose any such communications as may appear to the Court necessary to be known in order to explain any evidence which he has given, but no others.

Confidential communication with legal advisers.

130. No witness who is not a party to a suit shall be compelled to produce his title-deeds or any property, or any document in virtue of which he holds any property as pledgee or mortgagee, or any document the production of which might tend to criminate him, unless he has agreed in writing to produce them with the person seeking the production of such deeds or some person through whom he claims.

Production of witness’ title-deeds.

131. No one shall be compelled to produce documents in his possession, which any other person would be entitled to refuse to produce if they were in his possession, unless such last mentioned person consents to their production.

Production of documents which another person, having possession, would be entitled to refuse to produce.

132. A witness shall not be excused from answering any question as to any matter relevant to the matter in issue in any suit or in any civil or criminal proceeding, upon the ground that the answer to such question will criminate, or may tend, directly or indirectly, to criminate such witness, or that it will expose, or tend, directly or indirectly, to expose such witness to a penalty or forfeiture of any kind:

Witness not excused from answering on ground that answer will criminate.

Provided that no such answer, which a witness shall be compelled to give, shall subject him to any arrest or prosecution, or be proved against him in any criminal proceeding, except a prosecution for giving false evidence by such answer.

Proviso.

133. An accomplice shall be a competent witness against an accused person; and a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice.

Accomplice.

134. No particular number of witnesses shall in any case be required for the proof of any fact.

Number of witnesses.

## CHAPTER X.—OF THE EXAMINATION OF WITNESSES.

135. The order in which witnesses are produced and examined shall be regulated by the law and practice for the time being

Order of production and examination of witnesses.

relating to Civil and Criminal Procedure respectively, and, in the absence of any such law, by the discretion of the Court.

136. When either party proposes to give evidence of any fact, the Judge to decide as to admissibility of evidence. Judge may ask the party proposing to give the evidence in what manner the alleged fact, if proved, would be relevant; and the Judge shall admit the evidence if he thinks that the fact, if proved, would be relevant, and not otherwise.

If the fact proposed to be proved is one of which evidence is admissible only upon proof of some other fact, such last-mentioned fact must be proved before evidence is given of the fact first mentioned, unless the party undertakes to give proof of such fact and the Court is satisfied with such undertaking.

If the relevancy of one alleged fact depends upon another alleged fact being first proved, the Judge may in his discretion either permit evidence of the first fact to be given before the second fact is proved, or require evidence to be given of the second fact before evidence is given of the first fact.

#### Illustrations.

(a) It is proposed to prove a statement about a relevant fact by a person alleged to be dead, which statement is relevant under section thirty-two.

The fact that the person is dead must be proved by the person proposing to prove the statement before evidence is given of the statement.

(b) It is proposed to prove by a copy the contents of a document said to be lost.

The fact that the original is lost must be proved by the person proposing to produce the copy before the copy is produced.

(c) A is accused of receiving stolen property knowing it to have been stolen.

It is proposed to prove that he denied the possession of the property.

The relevancy of the denial depends on the identity of the property. The Court may in its discretion either require the property to be identified before the denial of the possession is proved, or permit the denial of the possession to be proved before the property is identified.

(d) It is proposed to prove a fact (A) which is said to have been the cause or effect of a fact in issue. There are several intermediate facts (B, C, and D) which must be shown to exist before the fact A can be regarded as the cause or effect of the fact in issue. The Court may either permit A to be proved before B, C or D is proved, or may require proof of B, C and D before permitting proof of A.

137. The examination of a witness by the party who calls him shall be called his examination-in-chief.

The examination of a witness by the adverse party shall be called his cross-examination.

The examination of a witness, subsequent to the cross-examination by the party who called him, shall be called his re-examination.

138. Witnesses shall be first examined-in-chief, then (if the adverse party so desires) cross-examined, then (if the party calling him so desires) re-examined.

The examination and cross-examination must relate to relevant facts, but the cross-examination need not be confined to the facts to which the witness testified on his examination-in-chief.

The re-examination shall be directed to the explanation of matters referred to in cross-examination; and if new matter is, by permission of the Court, introduced in re-examination, the adverse party may further cross-examine upon that matter.

139. A person summoned to produce a document does not become a witness by the mere fact that he produces it, and cannot be cross-examined unless and until he is called as a witness.

140. Witnesses to character may be cross-examined and re-examined.

141. Any question suggesting the answer which the person putting it wishes or expects to receive, is called a leading question.

142. Leading questions must not, if objected to by the adverse party, be asked in an examination-in-chief, or in a re-examination, except with the permission of the Court.

The Court shall permit leading questions as to matters which are introductory or undisputed, or which have, in its opinion, been already sufficiently proved.

143. Leading questions may be asked in cross-examination.

144. Any witness may be asked, whilst under examination, whether any contract, grant or other disposition of property, as to which he is giving evidence, was not contained in a document, and if he says that it was, or if he is about to make any statement as to the contents of any document, which, in the opinion of the Court, ought to be produced, the adverse party may object to such evidence being given until such document is produced, or until facts have been proved which entitle the party who called the witness to give secondary evidence of it.

*Explanation.*—A witness may give oral evidence of statements made by other persons about the contents of documents if such statements are in themselves relevant facts.

*Illustration.*

The question is, whether A assaulted B.

C deposes that he heard A say to D—'B wrote a letter accusing me of theft, and I will be revenged on him.' This statement is relevant, as showing A's motive for the assault, and evidence may be given of it, though no other evidence is given about the letter.

145. A witness may be cross-examined as to previous statements made by him in writing or reduced into writing and relevant to matters in question without such writing being shown to him, or being proved; but if it is intended to contradict him by the writing, his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him.

146. When a witness is cross-examined, he may, in addition to the questions hereinbefore referred to, be asked any questions which tend

- (1) to test his veracity;
- (2) to discover who he is and what is his position in life, or
- (3) to shake his credit, by injuring his character, although the answer to such questions might tend directly or indirectly to criminate him, or might expose or tend directly or indirectly to expose him to a penalty or forfeiture.

147. If any such question relates to a matter relevant to the suit or proceeding, the provisions of section one hundred and thirty-two shall apply thereto.

*When witness to be compelled to answer.*

148. If any such question relates to a matter not relevant to the suit or proceeding, except in so far as it affects the credit of the witness by injuring his character, the Court shall decide whether or not the witness shall be compelled to answer it, and may, if it thinks fit, warn the witness that he is not obliged to answer it. In exercising its discretion, the Court shall have regard to the following considerations:—

(1). Such questions are proper if they are of such a nature that the truth of the imputation conveyed by them would seriously affect the opinion of the Court as to the credibility of the witness on the matter to which he testifies.

(2). Such questions are improper if the imputation which they convey relates to matters so remote in time, or of such a character, that the truth of the imputation would not affect, or would affect in a slight degree, the opinion of the Court as to the credibility of the witness on the matter to which he testifies.

(3). Such questions are improper if there is a great disproportion between the importance of the imputation made against the witness's character and the importance of his evidence.

(4). The Court may, if it sees fit, draw, from the witnesses' refusal to answer, the inference that the answer if given would be unfavourable.

149. No such question as is referred to in section one hundred and forty-eight ought to be asked, unless the person asking it has reasonable grounds for thinking that the imputation which it conveys is well-founded.

*Question not to be asked without reasonable grounds.*

*Illustrations.*

(a) A barister is instructed by an attorney or vakil that an important witness is a dacoit. This is a reasonable ground for asking the witness whether he is a dacoit.

(b) A pleader is informed by a person in Court that an important witness is a dacoit. The informant on being questioned by the pleader gives satisfactory reasons for his statement. This is a reasonable ground for asking the witness whether he is a dacoit.

(c) A witness, of whom nothing whatever is known, is asked at random whether he is a dacoit. There are here no reasonable grounds for the question.

(d) A witness, of whom nothing whatever is known, being questioned as to his mode of life and means of living, gives unsatisfactory answers. This may be a reasonable ground for asking him if he is a dacoit.

150. If the Court is of opinion that any such question was asked without reasonable grounds, it may, if it was asked by any barrister, pleader, vakil or attorney, report the circumstances of the case to the High Court or other authority to which such barrister, pleader, vakil or attorney is subject in the exercise of his profession.

151. The Court may forbid any questions or inquiries which it regards as indecent or scandalous, although such questions or inquiries may have some bearing on the questions before the Court, unless they relate to facts in issue, or to matters necessary to be known in order to determine whether or not the facts in issue existed.

152. The Court shall forbid any question which appears to it to be intended to insult or annoy, or which, though proper in itself, appears to the Court needlessly offensive in form.

153. When a witness has been asked and has answered any question which is relevant to the inquiry only in so far as it tends to shake his credit by injuring his character, no evidence shall be given to contradict him; but if he answers falsely, he may afterwards be charged with giving false evidence.

*Exception 1.*—If a witness is asked whether he has been previously convicted of any crime and denies it, evidence may be given of his previous conviction.

*Exception 2.*—If a witness is asked any question tending to impeach his impartiality and answers it by denying the facts suggested, he may be contradicted.

#### Illustrations.

(a) A claim against an underwriter is resisted on the ground of fraud.

The claimant is asked whether, in former transaction, he had not made a fraudulent claim. He denies it.

Evidence is offered to show that he did make such a claim.

The evidence is inadmissible.

(b) A witness is asked whether he was not dismissed from a situation for dishonesty. He denies it.

Evidence is offered to show that he was dismissed for dishonesty.

The evidence is not admissible.

(c) A affirms that on a certain day he saw B at Lahore.

A is asked whether he himself was not on that day at Calcutta. He denies it.

Evidence is offered to show that A was on that day at Calcutta.

The evidence is admissible, not as contradicting A on a fact which affects his credit, but as contradicting the alleged fact that B was seen on the day in question in Lahore.

In each of these cases the witness might, if his denial was false, be charged with giving false evidence.

(d) A is asked whether his family has not had a blood feud with the family of B against whom he gives evidence.

He denies it. He may be contradicted on the ground that the question tends to impeach his impartiality.

154. The Court may in its discretion permit the person who calls a witness to put any questions to him which might be put in cross-examination by the adverse party.

155. The credit of a witness may be impeached in the following ways by the adverse party, or, with the consent of the Court, by the party who calls him :—

(1) By the evidence of persons who testify that they, from their knowledge of the witness, believe him to be unworthy of credit;

(2) By proof that the witness has been bribed or has had the offer of a bribe, or has received any other corrupt inducement to give his evidence;

(3) By proof of former statements inconsistent with any part of his evidence which is liable to be contradicted;

(4) When a man is prosecuted for rape or an attempt to ravish, it may be shown that the prosecutrix was of generally immoral character.

*Explanation.*—A witness declaring another witness to be unworthy of credit may not, upon his examination-in-chief, give reasons for his belief, but he may be asked his reasons in cross-examination, and the answers which he gives cannot be contradicted, though, if they are false, he may afterwards be charged with giving false evidence.

*Illustrations.*

(a) A sues B for the price of goods sold and delivered to B. C says that he delivered the goods to B.

Evidence is offered to show that, on a previous occasion, he said that he had not delivered the goods to B. \*

The evidence is admissible.

(b) A is indicted for the murder of B.

C says that B, when dying, declared that A had given B the wound of which he died.

Evidence is offered to show that, on a previous occasion, C said that the wound was not given by A or in his presence.

The evidence is admissible. \*

156. When a witness whom it is intended to corroborate gives evidence of any relevant fact,

Questions tending to corroborate evidence of relevant fact, admissible.

he may be questioned as to any other circumstances

which he observed at or near to the time or place at which such relevant fact occurred, if the Court is of opinion that such circumstances, if proved, would corroborate the testimony of the witness as to the relevant fact which he testifies.

*Illustration.*

A, an accomplice, gives an account of a robbery in which he took part. He describes various incidents unconnected with the robbery which occurred on his way to and from the place where it was committed.

Independent evidence of these facts may be given in order to corroborate his evidence as to the robbery itself.

157. In order to corroborate the testimony of a witness, any former statement made by such

Former statements of witness may be proved to corroborate later testimony as to same fact.

witness relating to the same fact, at or about the time

when the fact took place, or before any authority legally competent to investigate the fact, may be proved.

158. Whenever any statement, relevant

What matters may be proved in connection with statement relevant under section 32 or 33.

under section thirty-two or thirty-three, is proved, all matters may be proved, either in order to contradict or to corroborate it, or in order

to impeach or confirm the credit of the person by whom it was made, which might have been proved if that person had been called as a witness and had denied upon cross-examination the truth of the matter suggested.

159. A witness may, while under examination, refresh his memory by referring to any writing made by himself at the time of the transaction concerning which he is questioned, or so soon afterwards that the Court considers it likely that the transaction was at that time fresh in his memory.

The witness may also refer to any such writing made by any other person, and read by the witness within the time aforesaid, if when he read it he knew it to be correct.

Whenever a witness may refresh his memory by reference to any document, he may, with the permission of the Court, refer to a copy of such document: Provided the Court be satisfied that there is sufficient reason for the non-production of the original.

An expert may refresh his memory by reference to professional treatises.

160. A witness may also testify to facts mentioned in any such document as is mentioned in section one hundred and fifty-nine, although he has no specific recollection of the facts themselves, if he is sure that the facts were correctly recorded in the document.

Testimony to facts stated in document mentioned in section 159.

*Illustration.*

A book-keeper may testify to facts recorded by him in books regularly kept in the course of business if he knows that the books were correctly kept, although he has forgotten the particular transactions entered.

161. Any writing referred to under the provisions of the two last preceding sections must be produced and shown to the adverse party if he requires it; such party may, if he pleases, cross-examine the witness thereupon.

\* Right of adverse party as to writing used to refresh memory.

162. A witness summoned to produce a document shall, if it is in his possession or power, bring it to Court, notwithstanding any objection which there may be to its production or to its admissibility. The validity of any such objection shall be decided on by the Court.

Production of documents.



The Court, if it sees fit, may inspect the document, unless it refers to matters of State, or take other evidence to enable it to determine on its admissibility.

If for such a purpose it is necessary to cause any document to be translated, the Court may, if it thinks fit, direct the translator to keep the contents secret, unless the document is to be given in evidence: and if the interpreter disobeys such direction, he shall be held to have committed an offence under Section one hundred and sixty-six of the Indian Penal Code.

163. When a party calls for a document which he has given the other party notice to produce, and such document is produced and inspected by the party calling for its production, he is bound to give it as evidence if the party producing it requires him to do so.

164. When a party refuses to produce a document which he has had notice to produce, he cannot afterwards use the document as evidence without the consent of the other party or the order of the Court.

#### Illustration.

A sues B on an agreement and gives B notice to produce it. At the trial, A calls for the document and B refuses to produce it. A gives secondary evidence of its contents. B seeks to produce the document itself to contradict the secondary evidence given by A, or in order to show that the agreement is not stamped. He cannot do so.

165. The Judge may, in order to discover or to obtain proper proof of relevant facts, ask any question he pleases, in any form, at any time, of any witness, or of the parties, about any fact, relevant or irrelevant; and may order the production of any document or thing: and neither the parties nor their agents shall be entitled to

make any objection to any such question or order, nor, without the leave of the Court, to cross-examine any witness upon any answer given in reply to any such question:

Provided that the judgment must be based upon facts declared by this Act to be relevant, and duly proved.

Provided also that this section shall not authorise any Judge to compel any witness to answer any question, or to produce any document which such witness would be entitled to refuse to answer or produce under sections one hundred and twenty-one to one hundred and thirty-one both inclusive, if the question were asked or the document were called for by the adverse party; nor shall the Judge ask any question which it would be improper for any other person to ask under sections one hundred and forty-eight or one hundred and forty-nine; nor shall he dispense with primary evidence of any document, except in the cases hereinbefore excepted.

166. In cases tried by jury or with assessors, the jury or assessors may put any questions to the witnesses, through or by leave of the Judge, which the Judge himself might put and which he considers proper.

#### CHAPTER XI.—OF IMPROPER ADMISSION AND REJECTION OF EVIDENCE.

167. The improper admission or rejection of evidence shall not be ground of itself for a new trial or reversal of any decision in any case, if it shall appear to the Court, before which such objection is raised, that, independently of the evidence objected to and admitted, there was sufficient evidence to justify the decision, or that, if the rejected evidence had been received, it ought not to have varied the decision.

No new trial for rejection or improper reception of evidence.

Judge's power to put questions or order production.

Power of jury or assessors to put questions

# THE INDIAN EVIDENCE ACT, 1872.

## CONTENTS.

Preamble.

### PART I.

#### RELEVANCY OF FACTS.

##### CHAPTER I.—PRELIMINARY.

###### SECTION.

1. Short title.  
Extent.  
Commencement of Act.
2. Repeal of enactments.
3. Interpretation-clause.
4. "May presume."  
"Shall presume."  
"Conclusive proof."

##### CHAPTER II.—OF THE RELEVANCY OF FACTS.

6. Evidence may be given of facts in issue and relevant facts.  
Relevancy of facts forming part of same transaction.  
Facts which are occasion, cause, or effect of facts in issue.
8. Motive, preparation, and previous or subsequent conduct.
9. Facts necessary to explain or introduce relevant facts.
10. Things said or done by conspirator in reference to common design.
11. When facts not otherwise relevant become relevant.
12. In suits for damages, facts tending to enable Court to determine amount, are relevant
13. Facts relevant when right or custom is in question.
14. Facts showing existence of state of mind or of body or bodily feeling.
15. Facts bearing on question whether act was accidental or intentional.
16. Existence of course of business when relevant.
17. Admissions defined.
18. Admission—  
by party to proceeding or his agent ;  
by suitor in representative character ;  
by party interested in subject-matter ;  
by person from whom interest derived.
19. Admissions by persons whose position must be proved as against party to suit.
20. Admissions by persons expressly referred to by party to suit.
21. Relevancy of admissions against or in behalf of persons concerned.
22. When oral admissions as to contents of documents are relevant.

###### SECTION.

23. Admissions in civil cases when relevant.
24. Confession caused by inducement, threat, or promise irrelevant.
25. Confession made to a police officer not to be used as evidence.
26. Confession made by accused while in custody of police not to be used as evidence.
27. So much of statement or confession made by accused as relates to fact thereby discovered, may be proved.
28. Confession made after removal of impression caused by inducement, threat, or promise, relevant.
29. Admission otherwise relevant not to become irrelevant because of promise of secrecy, &c.
30. Consideration of proved admission affecting person making it and others jointly under trial for same offence.
31. Admissions not conclusive proof, but may estop.

##### STATEMENTS BY PERSONS WHO CANNOT BE CALLED AS WITNESSES.

32. Cases in which statement of relevant fact by person who is dead or cannot be found, &c., is relevant.  
When it relates to cause of death ;  
or is made in course of business ;  
or against interest of maker ;  
or gives opinion as to public right or custom or matters of general interest ;  
or relates to existence of relationship ;  
or is made in will or deed of deceased person ;  
or relates to transaction mentioned in section 13, clause (a) ;  
or is made by several persons and expresses feelings relevant to matter in question.
33. Evidence in a former judicial proceeding when relevant.

##### STATEMENTS MADE UNDER SPECIAL CIRCUMSTANCES.

34. Entries in books of account when relevant.
35. Entry in public record, made in performance of duty enjoined by law, when relevant.
36. Maps and plans when relevant.
37. Statement as to fact of public nature contained in any Act or Notification of Government, when relevant.
38. Statements in law-books.

##### HOW MUCH OF A STATEMENT IS TO BE PROVED.

39. What evidence to be given when statement forms part of a conversation, document, book, or series of letters or papers.

SECTION.

JUDGMENTS OF COURTS OF JUSTICE WHEN RELEVANT.

40. Previous judgments relevant to bar a second suit or trial.
41. Judgments in probate, &c., jurisdiction.
42. Judgment, order, or decree between third parties when irrelevant and when not.
43. What judgments, &c., not relevant.
44. Fraud, collusion, and incompetency of Court may be proved.

OPINIONS OF THIRD PERSONS WHEN RELEVANT.

45. Opinions of experts.
46. Facts bearing upon opinions of experts.
47. Opinion as to hand-writing.
48. Opinion as to existence of right or custom when relevant.
49. Opinions as to usages, tenets, &c., when relevant.
50. Opinion on relationship, when relevant.
51. Grounds of opinion, when relevant.

CHARACTER WHEN RELEVANT.

52. In civil cases, character to prove conduct imputed, irrelevant.
  53. In criminal cases, previous good character, relevant.
  54. Previous conviction in criminal trials relevant, but not previous bad character, except in reply.
- Character as affecting damages.

PART II.

ON PROOF.

CHAPTER III.—FACTS WHICH NEED NOT BE PROVED.

56. No evidence required of fact judicially noticed.
57. Facts of which Court must take judicial notice.
58. Facts admitted.

CHAPTER IV.—OF ORAL EVIDENCE.

59. Proof of facts by oral evidence.
60. Oral evidence must be direct.

CHAPTER V.—OF DOCUMENTARY EVIDENCE.

61. Proof of contents of documents.
62. Primary evidence.
63. Secondary evidence.
64. Proof of documents by primary evidence.
65. Cases in which secondary evidence relating to documents may be given.
66. Rules as to notice to produce.
67. Proof of signature and hand-writing of person alleged to have signed or written document produced.
68. Proof of execution of document required by law to be attested.

SECTION.

69. Proof where no attesting witness found.
70. Admission of execution by party to attested document.
71. Proof when attesting witness denies the execution.
72. Proof of document not required by law to be attested.
73. Comparison of hand-writings.

PUBLIC DOCUMENTS.

74. Public documents.
75. Private documents.
76. Certified copies of public documents.
77. Production of such copies.
78. Proof of other official documents.

PRESUMPTIONS AS TO DOCUMENTS.

79. Presumption as to genuineness of certified copies.
80. Presumptions on production of record of evidence.
81. Presumption as to Gazettes.
82. Presumption as to document admissible in England without proof of seal or signature.
83. Proof of maps made for purposes of any cause.
84. Presumption as to collections of laws and reports of decisions.
85. Presumption as to powers of attorney.
86. Presumption as to certified copies of foreign judicial records.
87. Presumption as to books and maps.
88. Presumption as to photographs, machine copies, and telegraphic messages.
89. Presumption as to due execution, &c., of documents not produced.
90. Documents thirty years old.

CHAPTER VI.—OF THE EXCLUSION OF ORAL

BY DOCUMENTARY EVIDENCE.

91. Evidence of terms of written contract.
92. Exclusion of evidence of oral agreement.
93. Exclusion of evidence to explain or amend ambiguous document.
94. Exclusion of evidence against application of document to existing facts.
95. Evidence as to document unmeaning in reference to existing facts.
96. Evidence as to application of language which can apply to one only of several persons.
97. Evidence as to application of language to one of two sets of facts to neither of which the whole correctly applies.
98. Evidence as to meaning of illegible characters, &c.
99. Who may give evidence of agreement varying terms of document.
100. Saving of provisions of Indian Succession Act relating to wills.

PART III.

PRODUCTION AND EFFECT OF EVIDENCE.

CHAPTER VII.—OF THE BURDEN OF PROOF.

101. Burden of proof.
102. On whom burden of proof lies.
103. Burden of proof as to particular fact.

SECTION.

104. Burden of proving fact to be proved to make evidence admissible.
105. Burden of proving that case of accused comes within exceptions.
106. Burden of proving fact especially within knowledge.
107. Burden of proving death of person known to have been alive within thirty years.
108. Burden of proving that person is alive who has not been heard of for seven years.
109. Burden of proof as to partnership, tenancy, and agency.
110. Burden of proof as to ownership.
111. Proof of good faith in transactions where one party is in relation of active confidence.
112. Birth during marriage, conclusive proof of legitimacy.
113. Proof of cession of territory.
114. Court may presume existence of certain facts.

CHAPTER VIII.—ESTOPPEL.

115. Estoppel.
116. Estoppel of tenant.
117. Estoppel of acceptor of bill of exchange, bailee, or licensee.

CHAPTER IX.—OF WITNESSES.

118. Who may testify.
119. Dumb witnesses.
120. Married persons in civil and criminal proceedings.
121. Judges and Magistrates.
122. Communications during marriage.
123. Evidence as to affairs of State.
124. Official Communications.
125. Information as to commission of offences.
126. Professional communications.
127. Section 126 to apply to interpreters, &c.
128. Privilege not waived by volunteering evidence.
129. Confidential communication with legal advisers.
130. Production of witness' title-deeds.
131. Production of documents which another person, having possession, would be entitled to refuse to produce.
132. Witness not excused from answering on ground that answer will criminate.  
Proviso.
133. Accomplice.
134. Number of witnesses.

CHAPTER X.—OF THE EXAMINATION OF WITNESSES.

135. Order of production and examination of witnesses.
136. Judge to decide as to admissibility of evidence.

SECTION.

137. Examination-in-chief.  
Cross-examination.  
Re-examination.
138. Order of examinations. Direction of re-examination.
139. Cross-examination of person called to produce a document.
140. Witnesses to character.
141. Leading question.
142. When they must not be asked.
143. When they may be asked.
144. Evidence as to matters in writing.
145. Cross-examination as to previous statements in writing.
146. Questions lawful in cross-examination.
147. When witness to be compelled to answer.
148. Court to decide when question shall be asked and when witness compelled to answer.
149. Question not to be asked without reasonable grounds.
150. Procedure of Court in case of question being asked without reasonable grounds.
151. Indecent and scandalous questions.
152. Questions intended to insult or annoy.
153. Exclusion of evidence to contradict answers to questions testing veracity.
154. Question by party to his own witness.
155. Impeaching credit of witness.
156. Questions tending to corroborate evidence of relevant fact admissible.
157. Former statements of witness may be proved to corroborate later testimony as to same fact.
158. What matters may be proved in connection with proved statement relevant under sections 32 or 33.
159. Refreshing memory.  
When witness may use copy of document to refresh memory.
160. Testimony to facts stated in document mentioned in section 158.
161. Right of adverse party as to writing used to refresh memory.
162. Production of documents.

TRANSLATION OF DOCUMENTS.

163. Giving, as evidence, of document called for and produced on notice.
164. Giving, as evidence, of document production of which was refused on notice.
165. Judge's power to put questions or order production.
166. Power of jury or assessors to put questions.

CHAPTER XI.—OF IMPROPER ADMISSION AND REJECTION OF EVIDENCE.

167. No new trial for rejection or improper reception of evidence.

SCHEDULE.



separate portion which had been so separated and which he and his brothers held, had been expressly exempted from the sale at which the plaintiffs bought their share of the zemindary. Several of the defendants who had appeared urged that the plaintiffs could not dispossess them from the houses, gardens and tanks which they had in the zemindary. One of the defendants also objected that there had been a mis-joinder of several causes of action in one suit and therefore the suit ought to be dismissed.

The Subordinate Judge of Sylhet, before whom the suit was instituted, decided the preliminary objections against the defendants, and found as a fact that several of the defendants did join together in resisting the plaintiffs, and that although with regard to some of the defendants there was no proof that they actually took part in resisting the plaintiffs' taking possession; he found also that they held the lands within the zemindary; he believed that they were also at the bottom of the confederacy; and he therefore decreed the plaintiffs' suit together with mesne profits against all the one hundred and thirty-four defendants.

Against this decision only Omera Churn Deb appealed to the Judge of zillah Sylhet and the Judge reversed the decision of the Subordinate Judge as far as Omera Churn Deb was concerned, on the ground that he held no lands to which the plaintiffs were entitled under the purchase they had made at the auction sale and that he did not resist the plaintiffs in taking possession.

Upon this the plaintiffs appealed to the High Court against the judgment of the Judge releasing Omera Churn Deb from all liability under the decree passed by the Subordinate Judge.

The appeal to the High Court was heard and decided by Mr. Justice E. Jackson and the late Mr. Justice Unocool Chunder Mookerjee, who dismissed the appeal of the plaintiffs as against Omera Churn Deb and also dismissed the plaintiffs' suit altogether on the ground that the plaintiffs' remedy lay in the Criminal Court and also on the ground that the suit in its present form was a mis-joinder of several causes of action against several parties in one suit.\*

Against this judgment the plaintiffs applied for a review of judgment, upon which the following judgment was recorded:—

This is an application to review the decision of this Court, dated the 15th of July last. Of the learned judges who passed that decision, one is dead and the other is absent, and is likely to be absent for a period of more than six months. We may however remark that the learned judge who wrote the decision, Mr. Justice Elphinstone sitting with Mr. Justice Kemp, was of opinion that the learned Counsel for the Petitioners had made out a sufficient case to admit this Review. The Review was therefore admitted and the case has now been thoroughly argued. It appears that the Plaintiffs who are represented by Mr. Woodroffe are purchasers of a Taluk at an auction for arrears of Government Revenue, the two Plaintiffs having purchased a 7 annas share of which Ram Chundra Pal took 6 annas, and Naba Kishore Sen the remaining share.

On proceeding to take possession of the Taluk they were opposed by the Defendants and the conduct of the Defendants was such that the Plaintiffs very wisely abstained from attempting to take possession by force and sought redress in the Civil Court. The Defendants are very numerous, some 134 in number. Many of them did not defend the suit at all, others put in appearance in the first Court, but their defence was however not a common defence. Some of them pleaded that they had no elaka or connection with the Talook in dispute, others that they had relinquished the lands held by them in that Talook, and others again that they held mirash rights. In short their defence was a varying one and not in any way a common one. The Subordinate Judge, after going into the defences of the different groups of Defendants, found that their allegations had not been proved and that they had all wrongfully combined together to resist the Plaintiffs' obtaining possession of their auction-purchased Talook. A decree was therefore passed against the Defendants in favour of the Plaintiff. With this decision all the Defendants were content with the exception of one namely Umera Churn Dey, and he appealed to the Judge not against the whole of the decision, but against that part of it only which affected him. His allegation was that no witnesses had identified him as having taken part in the common object of the Defendants to resist the Plaintiffs in their attempt to take possession of their purchased Talook. The Judge, without going into the question whe-

\* The judgment is reported in the 16th Volume of the *Weekly Reporter*.

ther Umera Churn was a mirashdar or not which would have materially affected the case inasmuch as if he had been a mirashdar it would have been a fact corroborating the evidence as to his having joined in the common object, found that there was not sufficient evidence to identify Umera Churn Dey as having taken part in the combination. As stated by the learned Counsel Mr. Woodroffe, it would have been well if his clients had let him alone and had not appealed against the decision in favour of Umera Churn Dey. However, being dissatisfied with the decision of the Judge, they appealed to this Court and unfortunately for them the result was that the decision of the first Court with which all the other Defendants had rested content was reversed not only in favour of those Defendants who had appeared and defended the suit in the first Court, but also as regards those Defendants who had not appeared at all and the Plaintiff's suit was dismissed *in toto*. To add to their misfortune an order was also made that they were to pay separate sets of costs to all these numerous Defendants.

We think that the decision of the Division bench of which review is now sought was wrong in law. The appeal of Umera Churn Dey, although he was one of the Defendants, was not an appeal against the whole of the decision of Court of first instance. Section 337 enacts "that if there be two or more Plaintiffs or two or more Defendants in a suit and the decision of the Lower Court proceed on any ground common to all, any one of the Plaintiffs or Defendants may appeal against the whole decree and the Appellate Court may reverse or modify the decree in favour of all the Plaintiffs or Defendants." Umera Churn Dey did not appeal against the whole decree; he only appealed against that portion of it which affected him and his defence in the first Court was not a defence common to the other Defendants. We therefore think that the learned judges were wrong in law in reversing the decree of the first Court in favour of those Defendants who had not appealed. We therefore reverse the former decision of this Court and restore that of the first Court with costs payable by the Defendants. With reference to Umera Churn Dey the learned Counsel admits that he has no case as against him and that he did not wish to take out notice against that party. It appears however that he has been made a party to this

application and he is therefore entitled to his costs which he will obtain from the Plaintiffs including one Gold Mohur as pleader's fees.

*Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Raneé Bhoboshondereé Dassah V. Issur Chundur Dutt and others, from the High Court of Judicature at Fort William in Bengal; the 3rd May 1872.*

Present:

SIR JAMES W. COLVILLE,

SIR MONTAGUE E. SMITH,

SIR ROBERT P. COLLIER.

(1) J being out of possession of certain properties to which he was entitled, entered into a contract with B by which he sold for a consideration a certain share of the same.

(2) The recital in the deed was, "Having received the purchase money in cash I sell the same to you and execute this deed of sale. The said amount is deposited with Dwarka Nath Lahoori, mooktear and agent on your behalf, and all the expenses of the suit for dispossession and my lodging expenses shall be paid out of that sum. In the event of the suit being decided in my favor we shall each of us take the costs, mesne profits, Jote Jumma and the Talook in the shares mentioned above. We will both of us institute the said suit in the Court as Plaintiffs. Neither of us shall be able without the consent of the other to compromise, settle or make any adjustment whatever of the case."

(3) On J's subsequently entering into a compromise with I, the party who was in possession, the present suit was brought by B to recover possession of the properties mentioned in the deed both against J and I.

(4) Their Lordships in Privy Council with reference to the provisions of the deed hold, that it did not operate as a present transfer of the property, but as an agreement to transfer so much of it as might be recovered in a suit to be instituted to which both I and B were to be parties.

(5) The plaintiff in a suit, whether in the form of a suit for specific performance of, or for damages for breach of a contract, ought to contain allegations to the effect either that the Plaintiff had performed his part of the contract or that he was ready and willing to perform the specified condition but was prevented by the wrongful act of the Defendant.

This suit was based upon a deed executed by Jogessur Ghose, in favour of the Plaintiff, in August 1866. The effect of that deed, as far as it is material, may be thus stated: it recites that Jogessur Ghose was entitled to certain properties from his maternal grandmother, that he had been dispossessed of the whole of those properties, and thus proceeds:—"It is now necessary to institute a suit in Court for the recovery of possession of the whole of the properties consisting of the aforesaid jote jumma, talook, &c., and mesne profits, and as I have not the means to institute a suit at my own expense, I have determined to sell you a moiety or 8 annas share of the 12 annas 6 gundas 2 cowrees 2 krants of the above jote jumma, being the share left by my maternal grandmother, to which I am en-



"titled, an 8 annas share of the talook aforesaid, and an 8 annas share of the mesne profits during the period of dispossession, and having fixed the consideration for the same at Rs. 3,000, and received the purchase money in cash, I sell the same to you and execute this deed of sale. The said amount is deposited with Dwarkanath Lahory, mookhtear, the agent on your behalf, and all the expenses of the suit for dispossession and my lodging expenses shall be paid out of that sum. In the event of the suit being decided in my favour, we shall each of us take the costs, mesne profits, jote jumma, and the talook in the shares mentioned above. We will both of us institute the said suit in Court as Plaintiffs. Neither of us shall be able, without the consent of the other, to compromise, settle, or make any adjustment whatever of the case."

It appears that a short time after, in September 1866, Jogessur Ghose entered into a deed, which may be termed one of compromise, with Issur Chundur Dutt, who was the claimant and in actual possession of the greater part of the property referred to in the previous deed, and that by this deed of compromise a portion of the property was divided between them. Thereupon this suit was brought by the Plaintiff. It is material to observe that it is not a suit claiming specific performance of or damages for breach of the contract entered into with the Plaintiff by Jogessur Ghose, but that it is in the nature of an action of ejectment. It is a suit to recover possession of the property mentioned in the first deed brought not only against Jogessur Ghose, but against Issur Chundur Dutt, the Plaintiff seeking to recover possession of the property by virtue of the title acquired under that deed, not only against Jogessur Ghose, but also against Issur Chundur Dutt, whom he alleged to have obtained possession of the property under forged conveyances.

The Court below dismissed the suit upon a technical ground, namely, that the plaintiff could not sue Issur Chundur without joining Jogessur Ghose as a co-Plaintiff. The High Court decided in their Lordships' opinion rightly that this was not a proper ground for dismissing the suit, and, hearing it upon its merits, determined it in favour of the defendants.

The principal question is the effect of the first deed, whether it operated as a present

transfer of the property, or only as an agreement to transfer it upon certain contingencies which did not happen. In support of the latter contention the case of *Rajah Sahib Perhlad Sein V. Baboo Budhoo Singh*, (12th Moore's Indian Appeals, page 275) was referred to. Without referring at length to that case, the circumstances of which are in many respects similar to those of the present, it may be enough to quote a passage from page 306, wherein their Lordships say,—“The Court below seem to have ruled that the effect of the execution of a bill of sale by a Hindoo vendor is, to use the phraseology of English law, to pass an estate irrespective of actual delivery of possession, giving to the instrument the effect of a conveyance operating by the statute of uses. Whether such a conclusion would be warranted in any case is in their Lordships' opinion very questionable. It is certainly not supported by the two cases cited in the Judgment under review,” (which are there referred to,) “in both of which actual possession seems to have passed from the vendor to the purchaser. To support it, the execution of the bill of sale must be treated as a constructive transfer of possession. But how can there be any such transfer, actual or constructive, upon a contract under which the vendor sells that of which he has not possession, and to which he may never establish a title. The bill of sale in such a case can only be evidence of a contract to be performed in future and upon the happening of a contingency of which the purchaser may claim a specific performance if he comes into Court showing that he has himself done all that he was bound to do.”

Having regard to this case and to the provisions which have been referred to of the deed, their Lordships are of opinion that it did not operate as a present transfer of the property, but as agreement to transfer so much of it as might be recovered in a suit to be instituted to which both Jogessur Ghose and the Plaintiff were to be parties.

This construction of the deed disposes of the case, for even if the Plaintiff be entitled to complain of breach of contract by Jogessur, she cannot recover under it possession of the property against Jogessur, *a fortiori* she cannot recover against Issur Chundur Dutt, who was no party to the deed. It may be observed that even if this were a suit for specific performance of the contract,

or damages for the breach of it, it would have been necessary for the Plaintiff to have alleged either performance of her part of the contract, which was the payment of Rs. 3,000 to Dwarkanath Lahory, and such further sums as might have been necessary to the maintenance of the action, or at all events that she was ready and willing to perform this condition but was prevented by the wrongful act of the Defendant. There are no such allegations, and if there had been it does not appear that they would have been sustained by evidence, for the case set up on the part of the Plaintiff was not the performance of this condition but something very different, namely, the payment to the Defendant himself of this sum of money,—a statement which is disbelieved by the High Court, in which disbelief their Lordships concur.

On these grounds their Lordships are of opinion that the Judgment of the High Court is right, and they will humbly advise Her Majesty that this Appeal be dismissed with costs.

### High Court of Judicature at Fort William in Bengal.

THE 19TH JUNE 1872.

*Present :*

The Hon'ble F. B. KEMP, and } *Two of the*  
 „ F. A. B. GLOVER, } *Judges of*  
 „ } *this Court*

CASE No. 8 OF 1872.

*Special Appeal from a decision passed by the Judge of Zillah Dacca, dated the 1st August 1871,—affirming a decree of the Moonisiff of Manickgunge, dated the 20th February 1871.*

Bishsheshurree Dasse, .. (Plf.) Appellant,  
*versus*

Kally Coomar Roy, ... (Deft.) Respondent.

*For Appellant.*—Baboo Sreenath Dass and Kishendoyal Roy.

*For Respondent.*—Baboo Bama Churn Banerjee.

Possession held by a co-possessor of chur lands under a temporary settlement concluded in his own name during the minority of plaintiff (a co-sharer) is not adverse to such plaintiff and does not bar his right to participate in that settlement, notwithstanding his neglect to sue within three years of his attaining his majority and twelve years from the date of such temporary settlement.

The facts of this case are clearly set forth in the judgment. It is needless therefore

to recapitulate them here. Both the Courts below dismissed the Plaintiff's suit, which was to establish her right to a share in the temporary settlement of certain chur lands which had been effected with the defendant, on the ground of limitation.

Plaintiff appealed to the High Court, and it was contended on her behalf by Baboo Sreenath Dass,

1st.—That as Plaintiff was in possession, along with the Defendant, of the parent estate to which the chur lands had accreted, she was entitled to possession of a proportionate share of these accretions, as such possession could not be considered as adverse to her.

2nd.—That as Plaintiff was entitled to sue for possession of her share of the chur lands within twelve years of any permanent settlement that might be concluded in respect of the same, and that as no such settlement had yet been made, there was no law to bar her claim to possession of her share of the lands which were held by Defendant only under a temporary settlement. In support of his contention the case of Cally Chunder Chowdhry (Deft.) Appellant *vs.* Monikurinka Chowdhraim and others (Pliffs.) Respts. Page 149 gap No. W. R. was cited.

For the Respondent Baboo Bama Churn Banerjee argued—

That as the Defendant Respondent held the land in dispute for more than twelve years, no matter whether under a temporary settlement, Plaintiff's present suit for possession was evidently barred by the statute of limitation. If a permanent settlement should be made at any future time, Plaintiff might then, if so advised, bring a fresh suit. At any rate, as she had neglected to sue within twelve years of the time when the temporary settlement was first made, *i. e.*, when her cause of action arose, her remedy was barred by lapse of time.

The following judgment was delivered :—

KEMP J.—(Glover J. concurring.)—

The Plaintiff is the special Appellant in his case. The suit was to establish her right to participate in the settlement of certain chur lands. It is alleged, and not disputed, that the Plaintiff's father Nobo Coomar Roy, and the Defendant's father Ram Coomar Roy, were first cousins and held the parent estate as co-sharers. After the death of Nobo Coomar the Plaintiff's mother succeeded to his moiety and after her death the Plaintiff succeeded to her father Nobo

Coomar's share; that during the Plaintiff's minority, the Defendant managed the property for her; that in the year 1263 the Plaintiff came of age, and in that year the Defendant made over to the Plaintiff her rights in the parent estate including the right to participate in the settlement of the chur lands; that during her absence at Jessore, the defendant has obtained a temporary settlement of those lands from the Collector in his own name. The Plaintiff therefore brings this suit to establish her right to a share in the temporary settlement which has been effected with the Defendant in respect of the chur lands. Both Courts have found that the Plaintiff's suit was barred.

In appeal it is contended that the Lower Courts are wrong in applying the law of limitation to the Plaintiff's claim, and that the possession of the Defendant under the temporary settlement obtained in the absence of the Plaintiff cannot be considered as adverse to the Plaintiff.

We have heard the argument on both sides, and a decision has been referred to by the Pleader for the Appellant to be found in the gap number of the *Weekly Reporter*, page 149, which in our opinion precisely fits the present case.—It is very clear that the title of the Plaintiff in the parent estate is not disputed;—the temporary settlement which the Defendant, in the absence of the Plaintiff or during her minority, has obtained from the Collectorate in his own name, does not in any way bar the Plaintiff's title to participate in that settlement and the possession of the Defendant, under this temporary settlement, is not, according to the ruling referred to above, a possession adverse to the Plaintiff. The decision of the Courts below is therefore reversed, and this appeal decreed with costs.

*Reference No. 16 from the Judge of the Small Cause Court at Howrah in the case of Praladh Tewaree versus Debnarain Ghose, dated 31st May 1872.*

The 29th June 1872.

*Present:*

The Hon'ble SIR R. COUCH, Kt., Chief Justice  
W. ANSLIE, Judge.

Baboo Bhyrub Chunder Banerjee for Debnarain Ghose.

The Magistrate having convicted Defendant, on prosecution by Plaintiff, of cheating and ordered that the money which he had obtained by it, namely Rs. 64, as the value of certain boats, should be returned to him, the Plaintiff cannot after that bring a civil suit against Defendant for breach of contract in not delivering the boats.

#### REFERENCE.

The plaint sets forth that the Defendant, having contracted to sell two green boats belonging to him at Rs. 64, had received the consideration money, but did not deliver the boats in question to the Plaintiff. That the Plaintiff therefore, prosecuted the Defendant in the Criminal Court under Section 417 of the Indian Penal Code, and that on 5th March 1870 the accused was found guilty of committing cheating, convicted and fined by the Magistrate in the sum of Rs. 200, in default of payment to be rigorously imprisoned for 6 weeks, and that the award of the Magistrate was upheld in the Appellate Court. That the Plaintiff sustained damages in consequence of the Defendant's not delivering the said boats by the loss of a net income of 10 annas per day exclusive of wages of the *Manjees* and *Danries* thereof. That the plaintiff sued the defendant in the Moonsiff's Court at Sulkea for the recovery of the two boats in question or the value thereof with damages. That by reason of the value of the claim having been considered by the Moonsiff excessive, and that the case being one cognizable by the Small Cause Court, the plaint was dismissed by the Moonsiff and the decision upheld in appeal. That the Plaintiff now sues the Defendant in this Court for the recovery of Rs. 500 being the value of the boats, viz Rs. 64, and damages which amounted from 16th Augran 1276 to 15th Falgoon 1278 B. S. last, viz 2 years 3 months, at the rate of 10 annas per day to Rs. 479-4 of which the amount of Rs. 43-4-0 has been relinquished by the Plaintiff.

The Defendant denied the demand and urged the following pleas:—

In bar of the hearing of the suit.

1st.—That Section I, Clause 2, Act XIV of 1859 bars the Plaintiff's claim.

2ndly.—That the Plaintiff having been compensated by the Criminal Court in the sum of Rs. 64, the value of the boats, he cannot sue the Defendant again in this Court for the recovery of the value thereof.

As to facts:

1st.—That the Defendant did not sell the boats in question to the Plaintiff, and that the amount of Rs. 64 was paid to him by the Plaintiff in liquidation of a debt due to him.

The points for determination which arise in this case therefore, are—

*Issues in bar.*

1st.—Whether Section I, Clause II, of Act XIV of 1859 bars the Plaintiff's claim?

2ndly.—Whether the Plaintiff's claim in the Civil Court for the recovery of the two boats or the value thereof can be maintained, the sum of Rs. 64 the value of the boats having already been awarded to him by the Criminal Court?

*Issues as to facts.*

1st.—Whether the Defendant sold to the Plaintiff the two boats in question on receipt of the consideration money Rs. 64, or the Plaintiff has paid the said amount in liquidation of his debt?

2ndly.—Whether the boats in question yielded a net profit of ten annas per day after paying the wages of *Danries* and *Manjees*?

With regard to the first issue in bar, I am of opinion that the Section alluded to above applies to damages for injury done to the person or personal property and not for recovery of the property itself or the value thereof or for the profits derived from it as *wasilat*, a suit for which can be brought within 6 years under clause 16, Section I, Act XIV of 1859.

Respecting the second issue in bar, I think that the Plaintiff's right to sue for the recovery of the boats or the value thereof in the Civil Court is not waived in consequence of his having been compensated by the Criminal Court under Section 44, Chapter III, of the Criminal Procedure Code for the trouble and expense incurred by the Plaintiff in prosecuting the Defendant in that Court.

*As to facts:*

From the deposition of the Plaintiff's witnesses Nos. 1, 2 and 3, it is clearly proved that the Defendant sold his two old green boats to the Plaintiff for Rs. 64, on a promise of delivering them over on the following day. The Defendant failed to prove that the sum of Rs. 64 was paid to him by the Plaintiff in payment of a debt due to him. He produced *khuttian* and *robar khottas* of which he made no mention at the first instance before the criminal authority, and from an inspection thereof it appears that the Plaintiff's name and the entry have subsequently been inserted in the *khottas* and

that they have not been properly kept. He examined two witnesses who could not conceal the fact that the consideration money was paid to the Defendant through and in presence of the Plaintiff's witnesses Nos. 1 and 3. Though in a way these supported the assertion of the Defendant that the money was paid to him in payment of a debt due by the Plaintiff, yet from the manner in which they deposed, I am persuaded to think that they have been tampered with to depose falsely, and I cannot place any confidence on their testimony.

As regards the second issue of fact, it is proved by the Plaintiff's witnesses that the daily profit of such a boat is on an average Rs. 1-8, and that it is divided sometimes into 4, 5, or 6 parts. I would, therefore, on an average fix one-sixth of one rupee eight annas, i. e. 4 annas to be the net profit of each boat per day, or 8 annas for two boats per diem. Calculating at this rate for two years and three months, the damages would amount to Rs. 360. From the deposition of the Plaintiff's witness No. 3, named Kally Comul Biswas, it appears that one of the boats was in a state which required repairs at the time; the Plaintiff has not deducted in his claim the charges to have been incurred for such reparation nor the amount which would be required for annual repairs and supply of materials such as purchasing sails, ropes, and other furniture. I would, therefore, deduct Rs. 25 a year for such purposes and give the Plaintiff a decree for the recovery of the two boats with damages Rs. 300. Should the Defendant fail to deliver the two boats in question to the Plaintiff within a week, the Defendant is to pay Rs. 64, being the value thereof and damages Rs. 300 with costs in proportion Rs. 48-7-4, in all Rs. 412-7-4, subject to the orders of the Honorable High Court to which the case has been referred for decision on law points.

Judgment of the High Court was delivered by the Chief Justice:—

In this case, according to the facts which have been found, the present Plaintiff who sues in the Small Cause Court, proceeded against the Defendant on a criminal charge of cheating, and obtained a conviction, and the Rs. 64 the sum which he had paid to the Defendant, was ordered to be paid to him.

Now, it certainly is not found expressly that that was to be paid as compensation for

the loss of money which the Plaintiff had suffered by the cheating, but there can be no doubt that that is what was intended. The Magistrate, having convicted the Defendant of the cheating, ordered that the money which he had obtained by it should be returned. The Plaintiff cannot after that bring a suit in the Small Cause Court for breach of contract in not delivering the boats. The criminal proceedings were founded upon a case that there was no contract between the parties, that the Defendant never meant to deliver the boats, and that the Plaintiff was defrauded. If there was a contract, the Plaintiff cannot avoid it on the ground of fraud and proceed against the Defendant under the Penal Code at one time, and at another when it suits his convenience, treat it as a valid contract. Therefore, this suit ought to have been dismissed.

It is not material whether the precise question is sent up to us. The case having come up to us, and it appearing that the suit ought not to have been brought and that the Plaintiff ought not to recover any damages for the non-delivery of the boats or otherwise, we order that the suit in the Small Cause Court be dismissed with costs, and the Defendant will also have the costs of the reference to this Court which we fix at Rs. 16.

*In the matter of a Reference by the Deputy Registrar in the case of Dooleechand.*

The 11th July, 1872.

*Present :*

The Hon'ble SIR R. COUCH, *Kt., Chief Justice.*

„ H. V. BAYLEY, }  
 „ W. MARKBY, } *Judges.*  
 „ W. ANISLIE, }

Held that by the words "subject matter in dispute" in Section 22, Act VI of 1871 is meant "subject matter in dispute" in the suit, and that therefore, that Section is no bar to a Regular Appeal being preferred to the High Court where the value of the appeal, in a suit of the value of Rs. 5,000 and upwards decided in the first instance by a Subordinate Judge is less than Rs. 5,000.

*For Appellant.*—Messrs. Woodroffe & Allan, and Babu Nilmadhub Sen for the appeal being to the High Court.

*For Respondent.*—Babu Unoda Pershad Banerjee on the other side.

With reference to the decision of Justices L. S. Jackson and W. Markby in the case of Sreemutty Sreemutty Dasse vs. Sreemutty

Bhuggobuty Dasse in Regular Appeal No. 281 of 1871, in which it was held that, in suits, decided by Subordinate Judges in the first instance, if the value of the appeal was less than Rs. 5,000, such appeal lay under Sec. 22, Act VI of 1871 to the district Judge, the Deputy Registrar thought it fit to send up to the First Bench for orders all those Regular Appeals including that of Dooleechand the value whereof was less than Rs. 5,000. The cases were then taken up by a Bench constituted as above.

Mr. Woodroffe pointed out what the former procedure was, and contended that there was nothing to shew that by the Act of 1871 the Legislature intended to introduce a change in respect thereof. He commented likewise upon the anomaly which would result from a construction different from what he contended for being put upon Sec. 22, Act VI of 1871. He contended that the words "subject matter in dispute" related to the subject matter in the suit and not in the appeal.

Mr. Allan followed on the same side.

Babu Unoda Pershad contended *per contra* that the words "subject matter in dispute" in Section 22, Act VI of 1871 referred to the subject matter in the appeal.

The following Judgments were delivered:—

*Couch, C.J.*—The question which is raised in this case is, whether, where the original suit is brought for a sum exceeding Rs. 5,000 or for property exceeding that value, and the decree is for a less sum or for property of less than that value, the appeal is to be to the District Court, or to this Court.

Before the passing of Act VI of 1871 there was no doubt that in such a case the appeal lay to the High Court. The words of Section 18, Act XVI of 1868, which was then the law, and which was only a continuation of the law as it was previous to the passing of that Act, are very clear; they are "in suits decided by any Subordinate Judge in the exercise of his original jurisdiction, of which the amount or value of the subject matter does not exceed five thousand Rupees, an appeal shall lie to the District Judge to whose control such Subordinate Judge is subject."

"In all other suits decided by any Subordinate Judge, whether in the exercise of his original or appellate jurisdiction, the appeal from the decision of such Judge shall be direct to the High Court."

Act VI. of 1871 is entitled 'an Act to consolidate and amend the law relating to the District and Subordinate Civil Courts in Bengal,' and it recites that "it is expedient "to consolidate and amend the law relating "to the District and Subordinate Civil "Courts." Although it purports to be an amending act, and such an alteration in the law as this would be with respect to the right of appeal may be considered by some persons an amendment, I think so important an alteration ought not to be held to have been made by the Legislature unless the language used in the Act shows a clear intention to make it.

Now, Section 22 of the Act, upon the construction of which the question depends, is one of several Sections which begin by defining the extent of the original jurisdiction of the district Judge or Subordinate Judge, Section 19 provides that the jurisdiction of a District Judge or Subordinate Judge extends in all original suits cognizable by the Civil Courts. Section 20 declares that the jurisdiction of a Moonsiff extends to all like suits in which the amount or value of the subject matter in dispute does not exceed one thousand Rupees, and Section 21 provides that appeals from the decrees and orders of District Judges shall, when such appeals are allowed by law, lie to the High Court, then Section 22 says, "appeals from the decrees and orders of "Subordinate Judges and Moonsiffs shall, "when such appeals are allowed by law, lie "to the district Judges, except where the "amount or value of the subject matter in "dispute," being the same expression which is used in Section 20 where the jurisdiction of the Moonsiff is defined.

For my own part, I cannot see any reason for supposing that in this Section the Legislature intended by 'subject matter in dispute,' the subject matter in dispute in the appeal. And there is this reason, I think, for its not being so; the appeal is only a stage in the suit; it is not a fresh suit but a part of the proceedings in the suit, and therefore, ordinarily I should say that with regard to the jurisdiction in appeals from decrees and orders of the District and Subordinate Judges, the expression 'subject matter in dispute' would mean the subject matter in dispute in the suit itself, unless, of course, a contrary intention

appeared as in an appeal to the Privy Council where the language is "the subject matter in dispute in the appeal."

There is another and a cogent reason why that construction should be adopted, and that is the extreme inconvenience, or worse than inconvenience which would arise, if the other construction were adopted. There might be, and no doubt, there would be cases, and, probably, many in which the decree being for a smaller sum than Rs. 5,000 and the whole suit coming by the appeal, as it must before the District Court, it would be open to the Respondent to object, without bringing any cross appeal, that the decree ought to have been for a larger amount or for the whole of the sum claimed; and thus the District Court, as an appellate Court, would have to adjudicate upon the right to a sum exceeding Rs. 5,000, and in a suit of the description that ought to come to the High Court in appeal.

There might also be the further difficulty that the Plaintiff having got a decree for less than Rs. 5,000 being dissatisfied with it, and considering that he was entitled to the whole sum which he claimed, might appeal to the High Court against it, the other party appealing to the District Court against the decree as it affected him. Probably, in such a case, the only course that could be adopted would be for the High Court to have the appeal to the District Court transferred to itself, and hear both together.

That is a state of things which would cause so much inconvenience that I think, the language of the Legislature admitting of the construction that the subject matter in dispute is the subject matter in dispute in the suit, we ought to adopt it. If the intention was to make so important an alteration with regard to the jurisdiction in appeal as the other construction would be, it ought to have expressed it more clearly. I think therefore that the appeal mentioned in the reference by the Deputy Registrar ought to be admitted, and the other appeals in which this question has been raised will be brought on for hearing in the ordinary course.

*Bayley, J.*—I am of the same opinion.

*Markby, J.*—I am of the same opinion.

I think the construction put by the Chief Justice on the Section in question is the



right one. It is quite true that Mr. L. S. Jackson and myself in considering this same question had decided, that the appeal, wherever it was for a sum less than Rs. 5,000, must go to the District Judge. But the matter has been now much more fully argued, and I think that the inconvenience which would arise under Section 348 pointed out by the Chief Justice is a good ground for concluding that the Legislature did not intend to alter the procedure existing at the time the act was passed.

*Ainslie, J.*—I concur.

*Special Appeal from a decision of the Subordinate Judge of Bhagulpore, dated 18th August 1871, affirming a decision of the Moonsiff of that district, dated 13th March 1871.*

SPECIAL APPEAL No. 125 OF 1872.

The 24th June 1872.

*Present :*

Hon'ble Sir R. COUCH, Kt, Chief Justice.

„ W. AINSLIE, Judge.

Nathoo Muhata ... (Plf.) Appellant,

*Versus*

Teloke Kooary ... (Dft.) Respondent.

*For Appellant.*—Babu Nilmadhub Sen.

*For Respondent.*—Mr. C. Gregory (Absent.)

Cases transferred to Moonsiff's Courts from the Revenue Courts under Act III of 1870 ought to be governed by the procedure laid down in Act VIII of 1859. In such cases, parties who have been affected by *ex parte* judgments or by judgments by default ought not to be compelled to put in their applications within 15 days as provided in Section 58, Act X of 1859, but ought to be allowed the full period mentioned in Section 119, Act VIII of 1859.

This was a suit originally instituted under Act X of 1859. An application for a re-hearing having been made to the Moonsiff after Act III of 1870 had come into operation, that officer held that as the application had not been made within fifteen days as provided in Section 58, Act X of 1859, it could not be entertained.

On appeal the Subordinate Judge affirmed the decision. Hence the special appeal.

It was contended on behalf of the appellant that Section 119, Act VIII of 1859, applied to the case, and not Section 58, Act X of 1859.

No body appeared to support the Judgment. The following Judgments were delivered :—

*R. Couch, C. J.*—It is possible that the Judge may have been misled by a passage in the Judgement in the case in the *XVI Weekly Reporter*, where it is said that the application

for the re-hearing of the case under Section 58, Act X of 1859 could be heard, and he may have supposed that the Court was laying down that the application was one under Section 58, Act X of 1859, and must be dealt with according to that Act. But Mr. Justice Macpherson was there only describing the application in the terms in which it had been made by the party. It had been erroneously made to the Moonsiff under Section 58, Act X of 1859, when it ought to have been made according to the provisions in Section 119, Act VIII of 1859, because it was by that Act that the procedure in the transferred suits was to be regulated.

The provisions of the law appear to me to be clear. In the first instance the suits which were pending in the Revenue Courts were not transferred to the Civil Courts, but suits which were brought after Act VIII of 1869 came into force were to be brought in the Civil Courts and to be regulated by Act VIII of 1859. The suits which remained in the Revenue Courts were naturally allowed to be regulated by the practice of these Courts. The Act of 1870 provided for the transfer from the Revenue Courts of the suits which had been allowed to remain there, and it having been provided by the Act of 1869 that the new suits should be regulated by the Code of Civil Procedure, it was natural that the Bengal Legislature should say that all future proceedings in the transferred suits should be regulated in the same way, and that the Civil Court should not apply to the transferred suits a procedure which it was not accustomed to. The provisions appear to me to be quite consistent. In this case the application was governed by Section 119, Act VIII of 1859, and the period allowed by that Section ought to have been given to the party.

We must reverse the order of the Lower Court and remand the case for re-hearing. The appellant will have the costs in this Court, Pleader's fees being fixed at Rs. 16.

*W. Ainslie, J.*—I wish to add that, in the order granting the rule reported in *XVI Weekly Reporter*, the only question before Mr. Justice Macpherson and myself was, what Court had jurisdiction to try the case. We did not consider what procedure was to be applied by the Court that might eventually have to try the case, it was not intended to decide that Section 58, Act X of 1859 would apply.



*Miscellaneous Regular Appeal No. 81 of 1872, from an order of the Judge of Bhagulpore, dated the 13th January 1872.*

The 2nd July 1872.

The Hon'ble H. V. BAYLEY,	} ... Judges.
and	
The Hon'ble W. AINSLIE,	} ... Appellant,
Muddun Thakoor (one of the judgment debtors) ...	
Versus	
Mr. Felix Lopez after his Trustees Morison and another, decreeholder	} Respondent.

*For Appellant.*—Mr. R. E Twidale.

*For Respondent.*—Babus Romesh Chunder Mitter and Sreenath Banerjee.

The words "Costs of the Courts below," occurring in the decree of the Privy Council, mean the costs incurred by the parties in the High Court as well as in the Lower Court.

"Costs of the High Court" include the charges of translation and printing actually incurred.

Interest on costs actually incurred ought to be awarded where there is a provision in the decree to that effect.

Decree of Privy Council not providing for interest on costs incurred in that tribunal, no interest ought to be given on such costs.

The facts of the case may be gathered from the judgment:—

*Bayley, J.*—We think there can be no doubt whatever in this case. The order of the Privy Council was in these terms—"It is hereby ordered that the said decree of the High Court of Judicature at Fort William in Bengal of the 28th November 1865 be and the same is hereby reversed with £276 12s. 2d. costs and that the judgment or decree of the Zillah Court of Bhagulpore of the 9th February 1865 be affirmed with costs in the Courts below.

Three objections have been taken in this appeal, *firstly* that the costs of translation and printing should not have been allowed to the decree-holder; *secondly* that no interest should have been allowed on those costs; and *thirdly* that no interest should have been allowed on the sum of £276 12s. 2d. allowed as costs by the Privy Council.

The Full Bench decision reported at page 187, Vol. VI, *Weekly Reporter*, has been very much relied upon by the appellant to show that we should not go beyond the terms of the decree, and it is contended that as there is nothing in the decree specified to shew that the charges for translation or printing are to be calculated as costs of these Courts, or that any interest was awarded either on those charges or on the £276 12s. 2d. awarded as costs by the Privy Council, none of these items should have been allowed.

Now, it is quite clear that what is affirmed by the Privy Council is the decree of the Zillah Court of Bhagulpore, dated the 9th February 1865, with costs in the Courts below. The "Courts below" included also the High Court. In the High Court the costs of translation and printing had to be undergone. It was a cost actually incurred and necessary to be incurred by the parties, and therefore the terms of the decree of the Privy Council in this case clearly include the charges for translation and printing as costs in the Courts below.

The only cases in which the question of translation and of printing having been included as costs had been before this Court, are one heard by Mr. Justice Markby sitting in the Privy Council department on the 20th May 1872, and one by Mr. Justice Ainslie and Mr. Justice Paul on the 13th April 1871, reported at page 356, Vol. XV, *W. R.* In both the cases the result of the orders passed is that the charges for translation and printing should be allowed as costs.

Under these circumstances it seems to me that the first ground of appeal must fail.

As regards the *second* objection, it appears that the decree of the Zillah Court which is the decree affirmed by the Privy Council and which has now to be executed, gives interest on the costs incurred. Now, the charges for translation and printing are also costs incurred—the money actually expended by the parties; and as the decree provides for interest on the costs, the decree-holder should not lose the interest on such costs.

As regards the *third* objection, *viz.* as to the interest on the £276 awarded as principal cost by the Privy Council in England, it is clear from the terms of the order of the Privy Council that a distinction is drawn between the costs allowed by that tribunal and the costs incurred in the Courts below. It seems to have been the intention of the Privy Council to make the £276 12s. 2d. a part of their own order for costs. No provision is there made for any interest on that sum, and we therefore think that no interest ought to be allowed on that sum.

The result of our order, therefore, is that the order of the Lower Court is affirmed except in so far as it awards interest on the £276 12s. 2d. awarded as costs by the Privy Council.

Under the circumstances we think that each party should bear his own costs of this

## In the High Court of Judicature at Fort William in Bengal.

THE 15TH JULY 1872.

*Present :*

The Hon'ble H. V. BAYLEY, }  
and  
The Hon'ble W. AINSLIE, } ... Judges.

CASE No. 189 OF 1872.

*Special appeal from a decision passed by the Assistant Commissioner and Subordinate Judge of Burpettah dated the 12th October 1871, affirming a decree of the Moonsiff of Burpettah dated the 21st August 1871.*

Dass Ram Dass ... (Def't.) Appellant,  
versus

Mohendro Roy Deeka } (Plffs) Respondents.  
and another ... }

*For Appellant.*—Baboo Bhogobutty Churn Ghose.

*For Respondent.*—Baboo Obhoy Churn Bose.

Plaintiff having at one time set up a title by purchase is not at liberty at another to change his case and to set up another title founded upon inheritance or joint purchase which is inconsistent with the title as originally disclosed.

THE Plaintiffs sued in this case to have their title declared to two-thirds of a certain property and to have their names registered in respect of the same. They alleged that the property originally belonged to three brothers although it stood in the name of the eldest brother Krishna Chunder; that it was attached and sold in execution of a decree against Krishna Chunder; that during attachment one of the Plaintiffs put in a petition stating that he had purchased the whole of the property and therefore it ought not to be sold; that his petition was rejected; that since the sale Plaintiffs have been in possession of their share of the property; and that as objection was taken by defendant to the registration of their names they thought it proper to bring the present suit.

The Defendant pleaded limitation, he having been in possession of the whole of the lands since 1857; that the Plaintiffs had no right to the lands; and that they were precluded from setting up now a title quite

different from what they had put forward before the sale.

Both the Lower Courts decreed the suit.

In special appeal it was contended that the plaint disclosed no cause of action, and that Plaintiffs could not now be allowed to set up after 15 years a different title from what had been set up in 1857.

On behalf of the respondent it was argued, that although in the petition of 1857 it was averred that the Plaintiffs' title to the whole of the lands rested upon a purchase, it was impossible in the absence of the order that was passed upon the petition to make out in what light the Court had viewed the statement.

The following judgment was delivered :—

*Ainslie, J. (Bayley, J. concurring).*—The first plea taken by the special appellant is that there is no cause of action. We think that the application of the auction purchaser to have his name registered in the Collectorate as the sole proprietor of the property in dispute was, under the circumstances alleged in the plaint, if they could have been proved, a sufficient cause of action. But on the second ground we think the special appellant must succeed. The Plaintiffs' petition of the 2nd July 1857 seems to us to be distinctly an allegation that he took the whole property by purchase from Kishen Chunder Roy. It has been suggested that if the order made upon that petition had been before us, we should have found that it was not so. However, that order is not upon the record and we must deal with the case as we find it. We think that the Plaintiff having set up a title by purchase to the whole property from Kishen Chunder, is not now at liberty to change his case and to come in and set up another and inconsistent title apparently founded either on inheritance or on joint purchase with Kishen Chunder. In support of this ruling we refer to a judgment of their Lordships in the Privy Council in the case of Eshan Chunder Sing *versus* Shama Churn Bhutto reported in VI, *Weekly Reporter*, Page 57, Privy Council Ruling. We therefore think that the Plaintiffs' suit ought to have been dismissed, and reversing the judgment of the Courts below we dismiss the suit with costs in all the Courts.

## High Court of Madras.

REFERRED CASE No. 14 OF 1870.

The 10th November 1871.

The Hon'ble SCOTLAND,—*Chief Justice.*

„ INNES—*Judge.*

Venkatarama Naik and another

*Versus*

Chinnathambu Reddi.

The Plaintiff had taken a loan of the Defendant upon a Mortgage-bond, and when clearing the debt, the Defendant returned the instrument and made the following endorsement on its back—"Rupees 263, principal including interest was received on account of this bond, and there is therefore, no lien whatever," but there was no signature to this endorsement. Subsequently Plaintiff found out that he had paid more than what was due under the said Mortgage-bond, and instituted a suit in the Small Cause Court for the balance, giving in evidence the said endorsement on the back of the bond. It was objected that the endorsement not being registered would not be evidence under Section 49 of Act XX of 1866.

Held by Scotland C. J. and Innes J.—

That the absence of the signature to the endorsement would not preclude its reception as corroborative evidence of the amount actually received by the Defendant.

*By Scotland, C. J.*—That the endorsement being tendered as evidence not of the creation or discharge of an obligation, but only as corroborative proof of a fact which though stated in writing could be proved by oral evidence, was receivable in evidence, for that purpose only, though not registered.

*By Innes, J.*—That there was nothing in the Registration Act which would render the endorsement inadmissible in evidence.

The following case was stated under Section 22, Act XI of 1865, by T. Appiah Chettiar, District Munsiff of Cuddalore, in Suit No. 1102 of 1869.

"The plaintiffs sue the defendant for the recovery of Rupees 10-10-0, said to have been overpaid to the defendant.

The plaint sets forth that the plaintiffs and 1st plaintiff's wife Venghi, and his son Chinnaya Naik (who are under the maintenance of plaintiffs) mortgaged their  $5\frac{1}{2}$  kánis of land to defendant on the 9th Tai of Aichaya (20th January 1867) for Rupees 186-10-0: that on the 25th Kartike of Sukla (8th December 1869) the plaintiffs asked defendant to receive the principal and interest

and to return the bond, when the defendant told them that the principal and interest due on the bond amounted to Rupees 263, which sum the plaintiffs paid to the defendant, and he endorsed each receipt on the back of the bond and returned it to plaintiffs: that the plaintiffs, not knowing how to read and write, referred to men who could read, when they found that the defendant received from them Rupees 10-10-0 more than was actually due; which sum the plaintiffs claim to recover from the defendant.

The defendant denies having received the Rupees 10-10-0, and states that on the day previous to the 25th Kartike (8th December 1869) the plaintiffs asked him what amount was due on the bond, in reply to which he wrote on a piece of cadjan that the amount due to him under the bond was Rupees 252-3-0; that on the 25th Kartike aforesaid the plaintiffs paid him only Rupees 252, and said that they had not brought the 3 annas: that the defendant received the Rupees 252 and simply returned the bond to plaintiffs, without endorsing the receipt of the money on the back of the bond as alleged by plaintiffs: and the defendant states that the endorsement is not his handwriting.

The mortgage bond in question was regularly registered under the Indian Registration Act XX of 1866, and by its terms  $5\frac{1}{2}$  kánis land were mortgaged to the defendant for Rs. 187-10-0.

The following is the translation of the endorsement on the back of the bond—"25th Kartike of Sukla, Rupees two hundred and sixty-three, principal including interest, was received on account of this bond, and there is therefore no mortgage lien whatever." This endorsement is not signed by the defendant but is attested by four persons.

The defendant's Vakcel pleads that the original document, which purports to be a mortgage of immovable property, has been duly registered, and that, therefore, the endorsement discharging that liability must also be registered under Clause 3, Section 17 of the Act, but that it is not registered and under Section 49, cannot be received in evidence.....and the last objection is that the document not being signed by the defendant it cannot be received in evidence.....As the endorsement is not signed by the defendant,

JUNE, 1872.

V. H. SCHALCH, Esq.,  
No. 1.

THE following Rules have been inserted as Clauses 16 to 19, Section I, p. 341, Board's Rules; para. 14 has been cancelled; the present para. 15 has been made para. 14; and para. 16, para 15:—

16. To secure uniformity in the system of making disbursements on account of estates under the Court of Wards, the following procedure must in future be followed:—

An annual budget, in sufficient detail to admit of proper check, and based on the actual expenditure of previous years, will be prepared and submitted for the sanction of the Court of Wards. Items entered in this budget will belong to one of these three classes:—

I. Current and continuous expenses which have been sanctioned once for all (as establishments and their contingencies).

II. Cost of special projects and measures, for execution of which final executive sanction has been obtained independently of the budget estimate.

III. Projects which it is proposed to carry out during the year, which have not yet been formally sanctioned.

17. All items of the third class, and all increases in items of the first class, should be succinctly explained; and if they are generally approved, the provision for carrying them out will be admitted into the budget estimate provisionally, it being distinctly understood that no expenditure may be incurred on such items until a formal executive sanction, irrespective of, and distinct from, the general approval which is conveyed by passing the item in the budget estimates, shall have been obtained from competent authority for entertainment of the increased establishment, or for execution of the work.

18. Monthly bills supported by vouchers will be submitted to the Collector of audit, that officer, and not the Commissioner, being the auditing officer by law; but the budget estimates must receive the sanction of the Commissioner, and an account current will also be submitted at the end of every month to that officer for his information and approval.

19. Disbursements in accordance with these Rules can be made by the manager from the proceeds at his disposal, the ba-

lance of the proceeds being remitted to the Collector's treasury.

No. 2.

THE following has been added to the Board's Rules as Clause 1A, Section III, page 341:—

When the estate of a male minor is first brought under the Court of Wards, a statement should be submitted to the Board, showing as accurately as possible all fixed annual charges against the estate, the amount of debt, &c.

The Board will thus be enabled to fix the amount that is to be considered as the net income of the estate, and thereby to determine whether the ward should be sent to the Institution. They will thus also have the data for calculating the proportion of the general expenses of the Institution to be borne by each ward after his admission.

No. 3.

THE following is added as Rule 38C, at page 349, Board's Rule:—

Whenever the Director proposes incurring expenditure on account of any minor in the Ward's Institution, other than such as may be absolutely necessary for his education,—that is to say, when he proposes to allow riding horses, drawing lessons, and other such indulgences,—it is his duty to refer the subject to the Board of Revenue, who will consult the Commissioner of the Division in which the ward's estate is situated on his proposal, and will decide whether the estate of the ward concerned can afford the expense.

A. MONEY, Esq.,

No. 4.

A CLASS of documents exists in the Province of Berar, known by the name of *suttahs*, which are generally executed by cultivators to deliver their cotton produce; and a question has now arisen whether these *suttahs* are transferable without the payment of stamp duty.

2. In connection with this question, information is required by the Government of India as to whether the definition of "Negotiable Instruments," in Section 2 of the general Stamp Act XVIII of 1869, is anywhere held to include any document, besides Bills of Exchange, Promissory Notes, and Cheques; and also, whether any documents, like the *suttahs* referred to above, circulate in the Lower Provinces as negotiable instruments, and without the payment of stamp duty upon transfer.

3. An immediate report on the subject should be forwarded by each District Officer to the Commissioner of the Division, who will submit his own complete report as soon as he has received replies from all his District Officers.

#### No. 5.

DISTRICT Officers are requested to submit final return under Act XVI of 1870 in the form of Return No. 43, showing the final assessments after objection and appeal, from the beginning of the operation under the Act till the close of the accounts. Sums which were outstanding as a balance on the 31st March 1872, and which have been struck off as unrealizable, should not be included in the final return now called for.

#### No. 6.

DISTRICT Officers are reminded that their Statement No. 1, called for in para. 3 of the Income Tax Rules just issued, should be now submitted at the earliest possible date.

2. Hitherto the member in charge has trusted in matters of income tax to Commissioners to supervise Collectors, and to Collectors to supervise Sub-Divisional Officers. The experience of the last two years has, however, proved that, while in some cases, the supervision has been full and sufficient, in others there has been little or none. Mr. Money has determined, therefore, for the current year, to exercise, from the Board's office, a more complete control over every officer in charge of income tax duties. He desires that the following statement may be submitted without fail, on the 18th of every month, direct to the Board, at the same time as the monthly return prescribed under Rule 9. A copy of this statement should also accompany the monthly return sent to the Commissioner:—

#### *Statement showing Progress of Work under Act VIII of 1872 in each Sub-Division.*

Column 1.—Name of each sub-division (including of course, sudder sub-division.)

Column 2.—Total number of persons assessable as per Column 4 of Statement No. 1 (Rule 3 of Rules issued for working Act VIII of 1872.)

Column 3.—Number who paid their tax within the month allowed by notice under Rule 3.

Column 4.—Number of notices under Section 27 of the Act issued up to the end of last month.

Column 5.—Number of notices issued this month.

Column 6.—Total number of notices issued.

Column 7.—Number who have paid after notice up to the end of last month.

Column 8.—Number who have paid after notice during the month.

Column 9.—Total of Columns 3, 7, 8.

The Superintendent of Stationery will be directed to supply fifty copies of the form of statement to each District Officer, and any further quantity wanted should be obtained on indent. The non-receipt of the forms, however, is in no case to be held as a reason for non-submission of the statement, which must punctually be forwarded to the Board's office on or before the 18th. On receipt of this Circular Order, each Collector should send a copy of the statement to each sub-division, enjoining punctual submission to himself at the beginning of each month. It will be understood that the submission of these abatements in no way relieves Commissioners or Collectors of their responsibilities of supervision.

#### No. 7.

THE attention of District Officers is drawn to paras. 10 and 12 of the Financial Resolution No. 2887, dated 19th April 1872, and to Section I, Clause III of Act VIII of 1872, which declares that the Act shall be deemed to have come into force on the 1st day of April 1872. Accordingly income tax is payable on all salaries, annuities, and pensions, as well as on instalments of interest on Government securities which became due on or after 1st April 1872, and in case any such salaries, annuities, pensions, or instalments of interest have already been disbursed without deduction of income tax, care should be taken to have the proper deductions made according to the provisions of the law at some subsequent time of payment.

#### No. 8.

THE following Rules under Section 27, Act VII of 1870, for the supply and retail sale of Court fee stamps, have been approved by the Government of India, as already intimated in the separate orders issued to the Commissioners of Divisions, and are now published for general information:—

1. "The use of adhesive Court fee stamps, for all fees required to be paid under the Court Fees Act (VII of 1870),

\* Date will be filled having been permitted from hereafter.

\* The Collectors and Treasury Officers are enjoined to carry

out the following Rules, for the supply and retail sale of the said stamps.

2. "Indents shall be made on the Superintendants of stamps under the Rules now in force, and contained in Chapter XXI of the Board's Rules, Section I.

3. "On the receipt of a supply, the officer in charge of stamps shall, with his own hands, open and himself count every stamp of the value of 4 annas and upwards, so that any deficiency may be at once detected. Adhesive stamps being supplied in sheets, each containing a number of stamps, the receiving officer must, for his own security, see that each sheet contains the full number. Stamps of the value of less than 4 annas should be counted also in the presence of the receiving officer. They are then to be compared with the invoice, and a receipt forwarded by the first post to the *dépôt* whence they were received.

4. "All other Rules now prescribed for the receipt and custody of stamps shall be applicable to adhesive Court fees stamps.

5. "These stamps shall be issued from the store under double locks, under the Rules contained in Section 3 of the Chapter of the Board's Rules above quoted.

6. "Stamps of any value, and in any quantity, are at all times to be sold at district head-quarters by the Treasurer of the Collector's office, or, where there is no Treasurer, by the Stamp Daroga; and at sub-divisions, by the Nazir, to any one requiring them, on payment of the full value of the stamps in cash.

7. "The presiding officer of any Court where adhesive Court fee stamps are used shall, in the exercise of his discretion, be competent to issue a certificate for the renewal, free of charge, of the stamp or stamps on any document, in cases when the re-writing of such documents has, through inadvertence or accident, been, in his opinion, rendered necessary; or where, after being duly stamped, and the stamps cancelled, it is found that the reason for presenting it to, or filing it in, the Court, has ceased to exist. Such certificates shall be sufficient authority to the Collector or officer in charge of a sub-division, as the case may be, to issue to the holder of the certificate other stamps of the value specified in the certificate, on delivery of the stamps which have been rendered useless.

"In Calcutta, stamps shall be sold by salaried vendors, to be appointed by the Board of Revenue."

2nd.—The date on which these Rules are to come into effect will hereafter be made known by Notification in the Gazette, when all necessary arrangements are reported to be complete.

V. H. SCHALCH, ESQ.

#### ERRATUM.

*The asterisk opposite the Annual Return of Irrigation Statistics, referred to in Circular Order No. 2 of September 1871, should be expunged.*

#### No. 9.

IN connection with the present system of conducting the settlements of land revenue in the Lower Provinces, the Government have approved of the following amendments being made in Chapter XX of the Board's Rules:—

1st. Add a column, headed "Nature of tenure under which land is held," after the last column, in each of the Forms Nos. 2 to 7, and after column 8 in Form No. 8.

2nd. For the fourth heading of Form No. 19 substitute: "Persons capable of being admitted to settlement under each of the modes of settlement prescribed in Government Order No. 3156, of 21st August 1871, with full explanation of their rights and position, and of the reason for the selection of the mode of settlement proposed to be adopted."

3rd. With reference to the eleventh heading of the Amin's report, Form No. 10, add a column in Form No. 19, thus—"Settlement Officer to make a clear and distinct statement of the rights claimed by each class of tenants in the estate, and to what extent such claims have been admitted, with an expression of his opinions in respect to the mode of settlement which should be adopted, and his reasons for that opinion in full."

4th. For Clause 3, Section 9, substitute: "When all the subordinate arrangements have been completed, the settling officer should procure the attendance of the party entitled to settlement and called upon him to sign the *kabulyat*, or state in writing his objection. These objections, if any, must receive consideration and be obviated if practicable; but should they be such as are not entitled to attention, the reasons for rejecting them and otherwise disposing of the estate should be recorded."

5th. Add to the above Section as Clause 3A: "When it is found necessary, in consequence of the recusance of the party entitled to settlement, to engage with other parties for the payment of Government revenue, the preference should be given (1st) to a farming settlement with one or more of the head ryots on the estate; (2nd) to khas management; (3rd) to a farming lease to an outsider."

6th. Clause 5 in the above Section should be corrected thus: In effecting the settlement of alluvial land with the proprietor of a temporarily settled estate (see Act XXXI of 1858), the settling officer should, with his consent and with the consent of the Board of Revenue, incorporate the assessment of the increment with that of the parent estate, taking one revised engagement for the amalgamated revenue of the whole as an integral estate. If the parent estate be permanently settled, or if, in the case of a temporarily settled estate, either the proprietor or the Board decline to assent to the course above prescribed, the increment must be assessed as a distinct estate and be henceforward held separately liable for the revenue assessed upon it."

7th. Omit Clauses 3 and 5, Section 10, adding the words "or on expiry of the lease" after the word "lease" in the second line of Clause 4, which will be numbered Clause 3.

8th. The first sentence in Clause 1, Section 12 should be altered to correspond with the recent orders thus: "The record of every settlement should be forwarded as soon as it is completed through the Commissioner's Office to the Board, and with it must invariably be submitted by the officer making the settlement, a report in English in the Form of Appendix No. 19, and an abstract of the information contained in the settlement proceedings in Form No. 20."

A. MONEY, Esq., C. B.

No. 10.

It is believed that Sub-Divisional Officers in Districts within the Saliferous tracts are not kept sufficiently informed of the state of salt sales within their jurisdiction. The monthly sale returns furnished by salt vendors will henceforth be submitted by them to the Sub-Divisional Officer, who, after examination, will forward them, with his remarks, to the Collector.

Rule XL of the Salt Manual is therefore amended as follows:—

For "Collector of the District" read "Sub-Divisional Officer within whose jurisdiction he resides."

After "Abkaree Darogah" read "for transmission to the Sub-Divisional Officer."

At the end of the Rule, add "The Sub-Divisional Officer will forward the returns to the Collector with his remarks."

No. 11.

THE attention of all officers engaged in supervising the working of the Sudder Distillery System is called to the necessity for constant watchfulness on their part over the proceedings of Distillery Establishments.

2. A Sub-Divisional Officer, finding lately that the daily sales at a distillery were smaller than at the same period of the preceding year, watched those who removed spirits under pass, and stopping by hazard a man carrying spirits which the pass showed to have paid 3 annas per gallon, had it at once again tested by the same Distillery Officer who had passed it, and found it to be of a strength which should have paid duty at 9 annas per gallon.

3. There is no doubt that similar frauds are constantly executed with success, and active vigilance can alone detect them. Under the Sudder Distillery System Government is liable to be defrauded in many ways. By connivance with the Distillery Establishment, the holder of a pass often takes out from the Distillery more spirits than are covered by the pass, as well as spirits of a higher strength than that at which the duty paid by him was calculated. Again, an old pass may be used with the date altered, to protect a fresh supply of spirits. The most common form of fraud is the taking of liquor from the Distillery without payment of duty, the Distillery Darogah being paid for his connivance. Sometimes the Darogah alone is concerned in the fraud, which consists in not crediting to Government sums received as duty.

4. No detailed rules for the check of these malpractices have ever yet been published. Attention has been called to the examination of statements, but no amount of such examination will avail to prevent practices as above defined.

5. Before issuing rules, the Member in charge would wish to be favored with the opinion of each Commissioner and Collector as to the best checks.



Act XXI of 1856.

" XIII of 1857.

The Board's rules for the guidance of officers in the Opium Department.

In this examination, books will not be allowed.

18. Candidates will not be examined for Police, Non-Regulation, and Opium appointments, without special permission. In the absence of such permission, all candidates must be examined in the subjects prescribed for civil appointments generally.

19. Every candidate when submitting his application, should state the subjects in which he desires to be examined, and annex certificates in the other subjects in which he is required by these rules to show that he is duly qualified. He must at the same time tender a fee for each subject in which he has to be examined, computed according to the scale given below, if he is a candidate for the higher class of appointments:—

	Ra.
Elementary English examination for	
European candidates ... ..	8
Law ... ..	8
Surveying and Engineering ... ..	8
Each vernacular ... ..	4
Medical examination ... ..	4
Riding or Walking examination ... ..	4

Candidates for appointments of less than Rs. 100 per mensem will pay fees at half the above rates.

It will be seen that the fee for the medical examination and for examination in one vernacular will be payable by all candidates, and the fee for the English examination by all Europeans liable to it. In other subjects no fee will be required when a certificate is produced.

20. Classes for teaching the above subjects, including Riding and Gymnastics, will be immediately opened at the Hooghly College, and the best arrangements possible for the same purpose will be made at the Patna College.

21. To every candidate who passes the examinations above prescribed, a certificate will be given stating the subjects in which he has passed, and that he is qualified for a Civil appointment, or for an appointment in the Police, or the Opium Department, as the case may be.

N. B.—This certificate will give no claim to an appointment.

## Circular No. 34.

## JUDICIAL DEPARTMENT.

## JUDICIAL.

To all Commissioners and all Magistrates of Districts,—(dated Calcutta, the 1st July 1872.)

I AM directed to call your very particular attention to the new Code of Criminal Procedure, Act X of 1872, which will come into force on 1st September next.

2. The changes in the powers and position of Magistrates effected by the Code are so considerable, that it will be desirable to re-gazette all Magistrates with the powers which it is deemed desirable to invest them with under the new law. The Lieutenant-Governor accordingly wishes to have submitted to him complete lists of Officers and Honorary Magistrates, with the powers for which each is recommended. These are to be submitted by Magistrates of districts through the Commissioners.

3. Magistrates will now be first, second, and third class, and Special Magistrates (section 42). Also power is taken, and will be very freely used, for the creation of benches of Magistrates (sections 50 to 56), and powers of summary trial may be conferred on any first class Magistrate and on benches of Magistrates (sections 222 to 230).

4. The powers of Magistrates of the first and second class are considerably enlarged. Grievous hurt by dangerous weapons, false evidence, and some other offences hitherto exclusively triable by Courts of Sessions, may in future be tried by a Magistrate of the first class; and very large classes of cases of common occurrence, hitherto triable by a first class Magistrate only, are now made triable by a Magistrate of the second class, who has also now power to pass a sentence of solitary confinement.

5. In fact, it may be said that almost all offences are now either entered in column 7 of the schedule as triable by the Court of Sessions, or are triable by a Magistrate of the second class. Almost the only cases entered as triable exclusively by a Magistrate of the first class are a very few offences by or relating to public servants (Penal Code, Sections 163, 166, 169); and against public justice (Sections 204, 208, 209, 210, 211,

215, 216), which are not so much separate offences in themselves, as offences occurring in the course of judicial proceedings. Practically then all sub-divisional officers and second class Magistrates invested with power to commit for trial will have, either in virtue of their own powers, or as qualified to hold preliminary inquiry in sessions cases, jurisdiction in nearly every case that can occur; and there is not the same necessity as before for giving first class powers, except where an officer is in every way fully qualified for such powers and there is real need for a Magistrate of that rank.

6. A second class Magistrate in charge of a sub-division has, as such, very large powers. Also, when in cases within his jurisdiction he deems a more severe punishment than he can give necessary, he can send on the file for orders to the Magistrate of the district after completing the trial. And in those sessions cases which are also triable by a first class Magistrate, if he deems that the case may best be tried by the latter officer, he can stop the preliminary inquiry at any stage and send the parties and witnesses on to the first class Magistrate.

7. All Magistrates in charge of sub-divisions will be able to hear on complaint, and to take up without complaint, cases within their jurisdiction; but the Lieutenant-Governor will invest all Magistrates of districts with power under section 48 to withdraw from any Magistrate subordinate to him the cognizance of any classes of cases which he may think proper to reserve.

8. No Magistrate other than the Magistrate of the district or of a sub-division of district has power to entertain any case (not made over to him) unless he is specially authorized to do so.

9. It will be observed that in most cases authority to hear complaints and exercise certain powers may be delegated by the Magistrate of the district to his subordinates; but there are some powers which can only be given by the Government: and when it is desired to give these powers to any officer, special application must be made. That will principally be necessary in the case of Magistrates not in charge of sub-divisions, the latter having by the law very large powers, subject to reservation by the Magistrate of the district.

10. A new provision of very great importance is that for giving power of summary trial (sections 222-230). This power must only be entrusted to first class Magistrates of approved efficiency and discretion. At the same time it will be a very great advantage that competent officers should exercise the power. The qualifications of each first class Magistrate must then be very carefully considered, and recommendation made accordingly to give or not to give him this summary power.

11. The Lieutenant-Governor hopes that he may be able very freely to use the power of appointing benches of Magistrates and Special Magistrates. Most of the Honorary Magistrates may probably be utilized under these designations, and many new ones may be created for the purpose. The Lieutenant-Governor thinks it most desirable that petty assaults and such cases should be disposed of summarily (under the provisions of section 225) by a bench sitting say once a week, and composed either of one paid and one or two unpaid Magistrates or wholly of unpaid Magistrates. Possibly an arrangement might be made by which a sub-divisional officer or other paid Magistrate should visit by way of circuit several of the most important places in each sub-division, and sitting with the local Magistrates of each place dispose periodically of all the petty cases without any cumbrous procedure or record of evidence.

And whether as benches or as Special Magistrates, the Lieutenant-Governor hopes that the leading men of each considerable Municipality might themselves dispose of the municipal and other petty cases. He will therefore freely and readily receive applications for the investing very many respectable men with powers as special Magistrates.

Under the provisions of section 52, the Magistrate of the district must make rules for the guidance of the benches of Magistrates sitting in his district, regarding the classes of cases to be tried, the times and places of sitting, the constitution of the bench, and the mode of settling differences of opinion. These rules will much depend on local circumstances, and the Lieutenant-Governor will therefore await the submission of proposed rules. They should be sent to the Commissioner, collated by him, and submitted to Government with his remarks.

12. In addition to the above-noticed provisions for summary trial, there are other provisions of the new Code calculated to diminish the burden of an excessive and laborious record of the evidence.

There are some special provisions regarding evidence, sections 327 to 330; but the new section, which will give very great relief to all the Magistrates of the first and second class, is section 333. Under this provision these Magistrates will be relieved from taking full evidence, reading it over to the witnesses, &c., &c., in all cases of petty theft, house trespass, rioting, mischief, &c.,—in fact in all the common classes of cases, and will only be required to keep in all those, as well as in all summons cases, a mere memorandum or note of the *substance* of the evidence as it proceeds—a process which ought not to be very long or tedious.

13. It is also to be observed that under the provisions of sections 361 and 362, the Magistrate has now a discretion in regard to the summoning of unnecessary witnesses, and will thus be able to keep cases within reasonable bounds.

14. The full and formal record of evidence will be confined then to exceptionally heinous and important cases. That being so, the Lieutenant-Governor thinks that the work will be quite manageable, and he does not propose to alter the present rule requiring Magistrates to take down with their own hands any evidence that must be recorded.

15. It is, however, different in regard to Sessions Judges. Except in so far as the enlarged powers of the Magistrates may relieve them of some cases, their procedure is not abbreviated. The Lieutenant-Governor has doubts whether all men are capable of taking down the evidence and conducting the cases efficiently at the same time, when a long trial and succession of trials is carried on from day to day and from week to week in the Sessions Court. With reference, therefore, to the provisions of section 335, the Lieutenant-Governor will be willing to consider the application of any overburdened Sessions Judge who may desire to be relieved of the duty of taking the full evidence in his own hand, and who would prefer to have a vernacular record of the evidence taken down by a skilled native writer, the Judge himself making only a memorandum of the

substance of the evidence. This, however, will only be possible if a good and quick writer is available to take the evidence down.

16. In connection with the subject of evidence, it will be observed that section 126 leaves no doubt of the full power of the criminal courts to make use of the police diaries during a trial.

17. It is not necessary to enter here upon many other changes introduced by the new Code. The provisions regarding jurisdiction over European British subjects and other matters speak for themselves, and principally involve judicial considerations. The Lieutenant-Governor will then only add the hope that all officers will without delay make themselves thoroughly masters of the new Code, and he will hope for the early and careful submission of the lists called for by this circular, that he may be able in due time to confer the powers proper to be conferred on each class of officers and unpaid Magistrates, and so may at the earliest possible time give full effect to the new Code.

#### GENERAL DEPARTMENT.

##### Circular No. 24.

#### GENERAL.

To Heads of Departments,—(dated Calcutta the 16th July 1872.)

In continuation of Circular No. 27, dated 13th October 1871, I am directed to inform you that the Lieutenant-Governor has been pleased to adopt the following order of arrangement of the districts in Bengal, which is to be observed in the census report and in all future departmental reports or tabular statements of every kind in all departments.

2. It will be seen that Commissioners' divisions are grouped into provinces, while districts are arranged geographically, and with reference to their position and importance.

#### BENGAL.

##### Western Districts.

- |                  |    |                      |
|------------------|----|----------------------|
| Burdwan Division | 1. | Burdwan.             |
|                  | 2. | Bancoorah.           |
|                  | 3. | Beerbhoom.           |
|                  | 4. | Midnapore.           |
|                  | 5. | Hooghly with Howrah. |

*Central Districts.*

- |                       |   |                              |
|-----------------------|---|------------------------------|
| Presidency Division   | { | 6. 24-Pergunahs.             |
|                       |   | 7. Nuddea.                   |
|                       |   | 8. Jessore.                  |
| Rajahmundry Division  | { | 9. Moorshedabad.             |
|                       |   | 10. Dinagepore.              |
|                       |   | 11. Maldah.                  |
|                       |   | 12. Rajshahye.               |
|                       |   | 13. Rungpore.                |
|                       |   | 14. Bograh.                  |
|                       |   | 15. Pubna.                   |
| Cooch Behar Division. | { | 16. Darjeeling.              |
|                       |   | 17. Julpigoree.              |
|                       |   | Cooch Behar Tributary State. |

*Eastern Districts.*

- |                      |   |                  |
|----------------------|---|------------------|
| Dacca Division ...   | { | 18. Dacca.       |
|                      |   | 19. Furreedpore. |
|                      |   | 20. Backergunge. |
|                      |   | 21. Mymensing.   |
|                      |   | 22. Sylhet.      |
|                      |   | 23. Cachar.      |
| Chittagong Division. | { | 24. Chittagong.  |
|                      |   | 25. Noakhally.   |
|                      |   | 26. Tipperah.    |
|                      |   | Hill Tipperah.   |

**BEHAR.**

- |                    |   |                |
|--------------------|---|----------------|
| Patna Division ... | { | 27. Patna.     |
|                    |   | 28. Gya.       |
|                    |   | 29. Shahabad.  |
|                    |   | 30. Tirhoot.   |
|                    |   | 31. Sarun.     |
|                    |   | 32. Chumparun. |

- |                       |   |                         |
|-----------------------|---|-------------------------|
| Bhaugulpore Division. | { | 33. Monghyr.            |
|                       |   | 34. Bhaugulpore.        |
|                       |   | 35. Purneah.            |
|                       |   | 36. Sonthal Pergunnahs. |

**ORISSA.**

- |                     |   |                           |
|---------------------|---|---------------------------|
| Orissa Division ... | { | 37. Cuttack.              |
|                     |   | 38. Pooree.               |
|                     |   | 39. Balasore.             |
|                     |   | Cuttack Tributary Mehals. |

**CHOTA NAGPORE.**

*South-West Frontier Agency.*

- |  |                   |
|--|-------------------|
|  | 40. Hazareebaugh. |
|  | 41. Loharduggah.  |
|  | 42. Singbhoom.    |
|  | 43. Maunbhoom.    |
|  | Tributary Mehals. |

**ASSAM AND ADJACENT HILLS.**

- |  |                              |
|--|------------------------------|
|  | 44. Goalparah.               |
|  | 45. Kamroop.                 |
|  | 46. Durrung.                 |
|  | 47. Nowgong.                 |
|  | 48. Sebsaugor.               |
|  | 49. Luckimpore.              |
|  | 50. Naga Hills.              |
|  | 51. Khasi and Jynteah Hills. |
|  | 52. Garo Hills.              |

C. BERNARD,

*Offg. Secy. to the Govt. of Bengal.*

## High Court Notices.

*The 22nd July 1872.*

IN supersession of the lists of subjects notified at page 2206 of the *Calcutta Gazette* of the 29th December 1869, and all previous orders or notifications of the Court, the following lists of subjects are hereby notified as those in which the candidates for the higher and lower grade pleaderships respectively will be examined under the rules passed by the High Court under Section 4, Act XX of 1865.

### HIGHER GRADE.

#### *Subjects.*

1st.—The law of property current in Bengal.

A. With reference to the permanent settlement; to the Government lien on land; to claims to hold lands, exempt from the payment of revenue, and to the mode in which estates can be brought to sale for arrears of revenue.

B. The law of under-tenures and the mode in which the same can be brought to sale for arrears of rent.

C. The relation of Landlord and Tenant.

D. Mortgages; Registration of Assurances.

E. The Hindoo Law of Inheritance, Succession, and Adoption.

F. Mahomedan Law.

G. The Indian Succession Act.

2nd.—Obligations arising from contracts.

3rd.—Civil Procedure.

4th.—The Law of Evidence.

5th.—The Law relating to stamps.

6th.—The Law of Limitation.

7th.—Criminal Law and Procedure.

#### *Regulations, enactments, and Text Books.*

Regulations (Bengal) I, VIII, X, XIV, XIX, and XLIV of 1793, and the Regulations and Acts by which the same have been altered; Act XI of 1859, and the preamble to Regulation (Bengal) II of 1793.

Regulation (Bengal) VIII of 1819; Act VIII of 1865 (Bengal Council); Act VIII of 1869, B.C., (except as to candidates to practice in Orissa, Chota Nagpore, and Assam, who will be required, as heretofore, to pass in Act X of 1859.)

Act VIII of 1869 (B.C.) except as above.

Macpherson on Mortgages; Act VIII of 1871.

Dayabhaga and Mitakshara; Dattaka Chandrika, or Macnaghten's Principles of Hindoo Law, first seven chapters.

Macnaghten's Principles of Mahomedan Law, except chapter 9.

Act X of 1865; Act XXI of 1870.

Macpherson on Contracts; Act IX of 1872.

Act VIII of 1859; Act XXIII of 1861; Act XI of 1865.

Act I of 1872.

Act XVIII of 1869; Act VII of 1870.

Act IX of 1871.

The Indian Penal Code (Act XLV of 1860) and the Code of Criminal Procedure; Act X of 1872.

### LOWER GRADE.

#### *Subjects.*

1st.—Hindoo Law.

2nd.—Mahomedan Law.

3rd.—Law of Contracts.

4th.—The law of property current in Bengal with reference to the permanent settle-

#### *Regulations, Enactments, and Text Books.*

Macnaghten's Principles of Hindoo Law, first seven chapters.

Macnaghten's Principles of Mahomedan Law, except chapter 9.

Macpherson on Contracts; Act IX of 1872.

Regulations (Bengal) I, VIII, X, XIV, XIX, and XLIV of 1793, and the Regula-

*Subjects.*

ment; to the Government lien on land; to claims to hold lands exempt from the payment of Government revenue, and to the mode in which estates can be brought to sale for arrears of revenue.

5th.—The relation of Landlord and Tenant.

6th.—The Law relating to Putnee Talooks.

7th.—The Law of Limitation.

8th.—The Law relating to Stamps.

9th.—Civil Procedure, including the Small Cause Court Act.

10th.—The Law of Evidence.

11th.—Criminal Law and Procedure.

*Regulations, Enactments, and Text Books.*

tions and Acts by which the same have been altered; Act XI of 1859 and the preamble to Regulation (Bengal) II of 1793.

Act VIII of 1869 (Bengal Council), except as to candidates in Orissa, Chota Nagpore, and Assam, who will be required to pass, as heretofore, in Act X of 1859.

Regulation (Bengal) VIII of 1819; Act VIII of 1865 (Bengal Council).

Act IX of 1871.

Act XVIII of 1869; Act VII of 1870.

Act VIII of 1859; Act XXIII of 1861; Act XI of 1865.

Act I of 1872.

Penal Code (Act XLV of 1860); Code of Criminal Procedure (Act X of 1872).

By order of the High Court,

W. CORNELL,

*Officiating Registrar.*

## NOTIFICATION.

*The 30th July 1872.*—In continuation of the Notification dated the 14th October 1871, published at page 1911 of the *Calcutta Gazette* of the 1st November 1871, authorizing the extension of the provisions of Act XXII of 1869 to the District of the Khasi and Jynteah Hills, the Lieutenant-Governor is pleased, under Section 5, of the same Act, to issue the following detailed rules for the administration of civil and criminal justice and police in the said district:—

*Rule for the Administration of Justice and Police in the Jynteah Hills and such portions of the Khasi Hills as have been constituted British Territory.*

## I.—GENERAL.

1. THE administration of the country known as the Khasi and Jynteah Hills is vested in the Commissioner of Assam, the Deputy Commissioner of the Khasi and Jynteah Hills, his assistants, and the native siems, wahadars, sirdars, dollois, pattors, and lungdohs, or such other classes of officers as the Hon'ble the Lieutenant-Governor of Bengal may see fit from time to time to appoint in that behalf, subject to the exceptions and restrictions and rules hereinafter recorded.

2. The following rules apply to all villages and tracts subject to British Jurisdiction.

## II.—POLICE.

3. The police of the Khasi and Jynteah Hills shall consist of—

(a)—Regular police, subject to Act V of 1861.

(b)—Rural police, consisting of sirdars, dollois, pattors, lungdohs, and other village authorities recognized as such by the Deputy Commissioner with their subordinate village authorities.

4. The control of the police in the Khasi and Jynteah Hills is vested in the Deputy Commissioner, acting under the orders of the Commissioner of Assam, or such other officers as the Hon'ble the Lieutenant-Governor of Bengal may from time to time appoint. Misconduct on the part of regular police shall be punished in accordance with Act V of 1861 and the Penal Code, or any special law which may hereafter be extended to the Khasi and Jynteah Hills. Misconduct on the part of rural police is punishable by fine, which may extend to Rs. 500, or by imprisonment to an extent which would be awardable under the Penal Code for a like offence. Imprisonment may be awarded in lieu of fine, but only by the Deputy Commissioner or other officers duly authorized.

## ERRATUM.

*Civil Rulings*, page 35, column 2nd, line 1st, for Bhaggemony Dossee, READ Sandeminy Dossee.

1159 C.  
12

# THE LAW OBSERVER.

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[No. 4.

## *New Code of Criminal Procedure Act X of 1872.*

Now that the operation of the new Code of Criminal Procedure, Act X of 1872, has been postponed till the 1st day of January next ensuing, we think it proper to offer a few remarks on those of its parts which appear to be wholly incompatible with a sound and enlightened administration of criminal law and justice.

The Act consists of twelve Parts divided into forty-two Chapters:—

Part I treats of preliminary matters, the laws repealed, the extent of local jurisdiction and definitions.

Part II bears upon the constitution and powers of Criminal Courts.

Part III embraces all matters connected with the Police.

Part IV treats of proceedings to compel appearance of parties under process of Courts, being either a summons or a warrant as the case may be.

Part V refers to inquiries and trials.

Part VI details the procedure in Appeal, Reference, and Revision.

Part VII lays down rules for the execution or the carrying out of sentences.

Part VIII treats of special rules of evidence in criminal cases.

Part IX lays down the procedure incidental to Inquiry and Trial.

Part X prescribes the form, &c., of the charge, judgment, and sentence.

Part XI treats of preventive jurisdiction of Magistrates.

Part XII contains miscellaneous provisions.

Thus the Act appears to be complete in all its details, but the question is, whether its provisions are calculated to extend to all classes of Her Majesty's subjects the same security of life, liberty, and property, without any distinction of creed, colour, or race, as it has ever been the object and aim of Government to promote by all possible manner of means. While, on the one hand, we are free to admit, that a considerable portion of the distinctions which at one time were made between the European British, and the Native subjects of Her Majesty in Criminal Trials now no longer exist, we cannot afford, on the other, to felicitate the Legislature in their complete exemption from that feeling which influenced the Gallic hero when he gave utterance to the celebrated "*væ victis*" of historic notoriety. Our observations will be confined to Chapters VII, XVIII, XX, XXIV, and XXV.

Let us now examine Part I, Chapter VII, which treats of criminal jurisdiction over European British subjects.

Section 71 defines the expression European British subjects, and from it, we learn, that "all subjects of Her Majesty born, naturalized or domiciled in the United Kingdom of Great Britain and Ireland, or in any of the European, American, or Australian colonies or pos-



sessions of Her Majesty, or in the Colony of New Zealand, or in the Colony of the Cape of Good Hope or Natal," including their children and grand-children legitimately born, in the male and female line, without any reference to the place of their birth, are European British subjects.

Now, it appears that by this definition, even the aboriginal inhabitants of the British Colonies or Possessions in America, or Australia, or of New Zealand, or of the Cape of Good Hope, or Natal, who have sworn fealty or allegiance to Her Britanic Majesty, are European British subjects down to the third generation, as well as any Indian subjects of Her Majesty naturalized or domiciled in any of the countries or colonies or possessions aforesaid.

By Section 72 only a Magistrate of the first-class, who is also a Justice of the Peace, and a Sessions Judge are competent to inquire into a complaint or try a charge against a European British subject unless they are disqualified by reason of the place of their birth, *i. e.*, not being themselves European British subjects.

Under Section 74 no Magistrate can, on conviction, pass on a European British subject any sentence exceeding three months' imprisonment, or fine up to one thousand rupees, although the same officer is, under the law, competent to pass, on any other class of Her Majesty's subjects, a sentence of imprisonment up to two years and a fine up to rupees one thousand.

By Section 75 if the Magistrate thinks that the maximum punishment which he can inflict on a European British subject is too inadequate for the offence with which such European British subject stands charged, he is to commit him at once to the Sessions Court,—if the offence complained of is not punishable with death or transportation for life, in which latter contingency, the commitment is to be made to the High Court.

Section 76 provides that no Sessions Judge or additional Sessions Judge or Assistant Sessions Judge of three years' standing or more, shall pass on any

European British subject a sentence exceeding one year's imprisonment or fine or both. If however he thinks the offence to call for a higher punishment, he shall transfer the case to the High Court.

Under Section 77 the Committing Magistrate is to report the case for the orders of the High Court, if the Sessions Judge of the Division happens to be not a European British subject.

Section 78 provides that trials of European British subjects before the Court of Session shall be conducted with the aid of Jurors or Assessors, provided that in either case not less than half the number of such Jurors or Assessors shall be European British subjects.

By Section 79, any European British subject, who is convicted by a competent Magistrate of any offence, may appeal either to the Court of Session or to the High Court.

Section 80 makes provision for an appeal to the High Court from a sentence passed by a Sessions Court on any European British subject.

By Section 81, any European British subject, who is detained in custody by any person and who considers such detention unlawful, may apply to the High Court which may have jurisdiction in the matter, for an order directing the person so detaining him to bring him before the said High Court, to abide such further order as may be made by it. The High Court before issuing such order may inquire on affidavit or otherwise on the grounds on which it is applied for and grant or refuse such application, or it may issue an order in the first instance, and when the person applying for it is brought before it, it may make such further order in the case as it thinks fit after such inquiry as it thinks necessary.

Now, we have no right to call in question the definition of "European British subject" as given in Section 71 or any other definition or description, by which it may please our Legislature to indicate any person or thing. They may, if they choose, call a man a horse, and an African

a European, and no body has any right to quarrel with them, unless such misnomer materially affects his rights or interests. That the definition we have referred to does not, in the abstract, interfere with the vested or other rights of any class of Her Majesty's British Indian subjects, is evident, and therefore we think it proper to abstain from making any comments upon it.

What strikes us however as particularly strange, is the rule by which it is declared, that no Magistrate and Justice of the Peace or Sessions Judge shall have jurisdiction to try a charge against a *European British subject* unless he is himself a *European British subject*. We really fail to perceive the wisdom of this provision. Here the jurisdiction of the Magistrate, &c., is determined by the place of his birth, quite irrespective of his character and attainments, and the powers with which he may have been invested by the Local Government. The integrity of a Mathew Hale or the varied learning of a Lyndhurst avails him not. He must be himself a European British subject before he is qualified to try a charge against a European British subject. What object this restriction is intended to serve, it is really impossible to divine. If to secure a fair and impartial trial is the object, we do not exactly see how that cannot be answered as well by the trial being held before a British Indian subject of Her Majesty's. Surely it is any thing but reasonable to suppose, that in high officials, race antagonism will be suffered so far to outweigh the demands of justice, as to induce them to forget themselves and the responsibility which attaches to their office. If Native gentlemen are considered fit to be entrusted with judicial functions, we think that fact in itself to be a sufficient guarantee of their superior character and attainments. If a Parsee is competent to sit in judgment over a Panjabee, we do not understand why he is not equally competent to try a European British subject. If he is not above race prejudices, he is not at all fit to be a Magistrate or a Judge.

Again, no European British Magistrate, unless he is a Magistrate of the first class and at the same time a Justice of the Peace to boot, can, under this law, try a charge against a European British subject. Are not such Magistrates of the second or third class who do not happen to be Justices of the Peace duly qualified to hold criminal trials, within the prescribed limit of the powers with which they have been invested? If they are qualified to try charges against the Natives and others, not being European British subjects, they must be considered to be as well qualified to try their own countrymen or any other class or classes of European British subjects, as defined in the Act under notice. Here, antagonism of race cannot be laid to their charge. What the Legislature insinuate against them by this exclusion is their general incompetency, that is, if we are not mistaken, their ignorance of the principles of law and jurisprudence. If our surmise is correct, we do not understand how these gentlemen are suffered to hold, within the range of their powers, trials other than those in which European British subjects are implicated.

Again, under this Act even a Magistrate of the first class cannot, in respect of a European British prisoner, award a severer punishment than imprisonment for three months, or fine up to rupees one thousand; although in respect of trials in which other persons are charged with criminal offences, he is competent to pass a sentence of two years' imprisonment and a fine up to rupees one thousand. The Sessions Judge too has his powers curtailed when he sits to try European British subjects. Ordinarily there is no offence in the Penal Code which he is not competent to try, and there is no punishment, including death and transportation for life, which he cannot award. But in respect of European British prisoners, if he considers them, with reference to the offence or offences with which they may stand charged, liable to the punishment of death or transportation for life, he must suspend all proceedings and commit them

to take their trial before the High Court, and in all other cases he is competent to try the charges against them with the aid of Jury or Assessor, but can, on no account, pass on them a higher sentence than one year's imprisonment or fine or both. This is really an anomaly. If the Magistrates and the Sessions Judges, who are declared qualified to try charges against European British subjects, are competent to award certain defined punishments under the law, it really transcends our powers to understand why they should be debarred from exercising similar powers when a certain class of Her Majesty's subjects happen to be implicated before them? Why should not Magistrates and Sessions Judges be competent to pass on all persons who deserve it, the full measure of punishment which they may award under the powers which the law gives them? We really fail to perceive the reason of the distinction. There is no reason whatever why Sessions Judges are not qualified to try charges against European British prisoners which may render a sentence of death or transportation for life absolutely necessary, when the law gives them powers to try same or similar charges against any other class of Her Majesty's lieges. But perhaps the Legislature think that it is not safe in such cases to entrust the life and liberty of this particular class of people into the hands of Mofussil Judges, though we are quite sure they cannot explain the reason why. Perhaps this is a pet fancy of which they cannot afford to divest themselves. Well and good. We will make this concession in their favor, but why restrict the powers of the Sessions Judges in all other cases? The cases, then involving death or transportation being eliminated from their file and committed to the High Court, they ought certainly in all other cases in which European British subjects are implicated to have the option dealing out to them, the same measure of punishment which they may see fit to inflict on others. But even here a distinction must be made. Where a native would be punished with an im-

prisonment for seven or fourteen years, a European British culprit would be suffered to escape with one year's imprisonment or fine or both at the highest. The Sessions Judges are wholly powerless in this matter. Their action is hampered by the law. There is no help.

Then again, this law gives the European British criminal convicted by a Magistrate, the option of appealing either to the High Court or the Sessions Court. This is curious indeed! An appeal from a sentence passed by a Magistrate ordinarily lies to the Sessions Court, why a departure should be allowed in any particular class of cases is certainly more than we can afford to tell. Although the law gives the option to the prisoner to appeal either to the Sessions Court or to the High Court, we are quite sure that all such appeals will, without exception, be preferred *per saltum* to the High Court. And then, one may fancy what a deal of trouble and expense will have to be borne by all those who may happen to be in any way connected with these unfortunate cases.

Section 81 embodies certainly a very good principle, but the right as therein defined being confined to European British subjects, we are compelled to denounce, as being a special proviso in favor of a particular class of people to the exclusion of the rest. A European British subject being detained in custody may apply to the High Court for an order directing the person so detaining him to produce his person. This, to be sure, is a very wholesome provision against arbitrary or unlawful imprisonment, being akin to the principle upon which a Writ of *habeas corpus* is issued under ordinary circumstances. But why should it be restrictive in its nature, being confined to a particular class of people for whose special behoof it is particularly intended? We would have had nothing to say against it, if it had been made *general* in its application, i. e., if in lieu of the expression "European British subject" in the section there had been used the word "person" to admit of the benefit of the provision being

made available by all classes of Her Majesty's lieges. We would not have manifested so much solicitude in the matter, if the Legislature had not by Section 82 prohibited the issue of the Writ of *Habeas Corpus, Mainprise, de homine replegiando* or any other Writ of a like nature beyond the local limits of the Presidency towns. Thus, it is evident, that European British subjects only have a remedy under this law against unlawful detention in the Moffussil. We do not mean to say that this has been done advisedly. Perhaps this is the result of an oversight, and accordingly we trust that the omission will be duly supplied by the earliest opportunity.

From the Sections to which reference has been made two corollaries may fairly be deduced, namely, first, that the Moffussil Criminal Courts are worthless; and second, that the life and liberty of European British subjects ought not to be made over to their tender mercies without some qualification or reservation.

We are free to confess that we fully endorse the first of these propositions, and accordingly we shall be most happy to see proper measures at once set on foot to replace the present *apologies* by what may strictly be called *Courts of Justice*. What we maintain is that, if they are at all suffered to dispense criminal justice, all classes of the people, who may choose to reside within the local limits of their jurisdiction ought to be made *equally* amenable to their influence.

With reference to the second proposition, we would fain like to see the same law administered to all classes of Her Majesty's subjects without any distinction of creed, color, or race. If the Moffussil Criminal Courts are good for any class or classes of people, they ought to be held good for European British subjects as well. That they are far from efficient, we do not hesitate a moment to admit, but that is no reason why only European British subjects should be exempted from their influence to a certain extent. It is a cardinal maxim in every system of

enlightened judicial administration that one and the same law ought to apply to all the classes of any particular community, without any distinction whatsoever, and where this rule is not strictly carried out, one cannot help denouncing the Legislature as being behind the age.

We would next advert to Part V, Chapter XVIII, which relates to what is called summary trials.

Section 222 details the offences which a Magistrate of a district may try summarily.

By Section 223 any Magistrate of the first class, and by Section 224 any Bench of Magistrates exercising the powers of a magistrate of the first class, may be empowered to try summarily all or any of the offences mentioned in Section 222.

By Section 225, the Local Government may invest any Bench of Magistrates invested with the powers of a magistrate of the second or third class, with powers to hold summary trials also in respect of certain offences therein specified.

Section 227 provides that in cases where there is no appeal, the Magistrates or Bench of Magistrates need not record the evidence of the witnesses, nor the reasons for passing their judgment, nor draw up a formal charge. A register, however, shall be kept, containing the following particulars:—

1. The serial number.
2. Date of the commission of the offence.
3. Date of the report or complaint.
4. Name of the complainant.
5. Name, parentage and residence of accused person.
6. Offence complained of or proved.
7. Prisoner's plea.
8. The finding and, in the case of a conviction, a brief statement of the reasons thereof.
9. The sentence.
10. Date on which the proceedings terminated.

Section 228 provides that in appealable cases, that is, where a Magistrate or a Bench of Magistrates passes a sentence of more than three months' imprisonment,

sonment or of fine exceeding rupees 200 or where a Bench of Magistrates acting under Section 225, convicts any person, a judgment shall be recorded, embodying the *substance* of the evidence in which the conviction was had and also the particulars mentioned in the preceding section.

Such judgment shall be *the only record* in cases coming within this section. By Section 230, any Bench of Magistrates may be empowered to prepare the aforesaid judgment or record by a clerk or other officer.

Frightful indeed!!! Really this is legislation with a vengeance!

The provisions embodied in the above sections are altogether novel in their character. They afford half educated young men, invested with magisterial functions, undue facilities for playing all manner of "fantastic tricks" without any check or restraint. As the offences which may be tried by them summarily involve punishment ranging from one year to seven years' imprisonment, it is indeed fearful to contemplate the result which must inevitably follow from such a procedure. Young and inexperienced officers without any legal training whatever and generally but imperfectly educated could not be expected to exercise the unbounded discretion which this law would confer on them with that circumspect moderation which ordinarily characterizes the proceedings of the trained judge. We all know what stuff the subordinate executive agency is in general made of. True, the members of the Covenanted Civil Service are, as regards general education, by far a superior class of officers, but then their imperfect knowledge of the language, the manners and customs and habits of the people is a great drawback to their efficiency as Magistrates. In their youthful zeal for the suppression of crime of every name and description within their district, they are apt to presume every poor devil who may happen to be arraigned before them to be actually guilty of the crime with which he may be charged. An advocate may

tell them over and over that presumption is always in favor of innocence and that every man must be presumed to be innocent until the contrary is proved, but this however much they may be inclined to admit in theory, they can seldom be persuaded to act up to those elementary principles of criminal jurisprudence. We meet with such instances every day. The officers who preside in the superior Courts are painfully aware of the fact, inasmuch as they are not unfrequently under the necessity of quashing the convictions arrived at by the Courts of first instance either upon no evidence or upon evidence which cannot at all be relied upon, not to speak of the innumerable instances in which the law is misconstrued or otherwise wrongly administered. Under these circumstances, one may easily fancy the incalculable mischief that must result from the procedure which the Legislature have thought fit to adopt in what they have been pleased to call "Summary Trials." Why these trials should be called *summary* in particular, we cannot for the life of us understand, nor why in respect of these, there should be no appeal in those cases in which the sentence does not exceed three months' imprisonment or a fine of Rs. 200. There is nothing in the nature of the offences, so far as we are aware, which warrants a departure from the ordinary rules of procedure. Ordinarily no appeal lies even under this law from a sentence passed by a Magistrate of the first class or of a Sessions Judge in which the measure of punishment is not higher than imprisonment for one month or a fine of Rs. 50 or whipping. But why a distinction should be made in respect of these summary trials is certainly more than we can afford to tell. We are free to confess that we are too obtuse to perceive the reason or the rhyme of the thing.

Substantially in respect of these trials, the law provides no appeals. True an appeal is allowed in those cases in which the sentence may be for more than imprisonment for three months or fine of rupees two hundred, but that is a mere

farce,—a mere mockery at best. What? talk of an appeal in which there is no record other than the judgment, and expect the Appellate Court to do justice in the case by a reference to such record? Really this is the very height of absurdity. Under this law, a man sentenced to seven years' imprisonment cannot substantially claim the benefit of an appeal properly so called. If the only record of the case is the judgment embodying the *substance* of the evidence, how can it be expected that justice may be done in appeal, when in all probability the judgment as matter of course must exhibit such part only of the evidence taken in the cause as may be necessary for the purposes of the conviction. And then it must be remembered that this sentence of seven years' imprisonment may be passed by a gentleman who is considered not fit to pass on a European British subject a higher sentence than imprisonment for three months, which however is appealable to the Court of Session or even to the High Court at the option of the prisoner. This is really even-handed justice' with a vengeance. What would the British public say to this?

That the Sessions Judges with all their shortcomings are as a rule by far superior in knowledge of law and experience to magistrates of all grades and that therefore a right of appeal to them in all cases of convictions arrived at by the Courts of first instance would certainly promote the ends of justice, are almost axiomatic truths,—propositions which are self-evident and require no lengthy or elaborate demonstrations to prove them. Accordingly we think that the provisions of Chapter XVIII are all but calculated to subserve the ends of justice.

We turn now to the subject of appeals. Part VI, Chapter XX, provides generally for appeals against convictions on first trials. There is but one appeal allowed under this law. An appeal from orders or sentences passed by Magistrates of the second and third classes lies to the Magistrate of the district or to a

Magistrate of the first class who has been empowered by the Local Government to hear such appeal, and any person required by a Magistrate of the first class to give security for good behaviour, may also appeal from such order to the Magistrate of the district. And from convictions arrived at by the magistrate of the district or other magistrate of the first class an appeal lies to the Court of Session. Similarly any person convicted on trial held by a Court of Session may appeal to the High Court. This appeal may be on a matter of fact as well as on a matter of law, but if the conviction was in a trial by a Jury, the appeal lies only on a point of law.

A person sentenced to death by the Sessions Court has only seven days' time allowed him to appeal, if he chooses to prefer such appeal, to the High Court, but when it appears to the Sessions Judge that the execution of the sentence ought not to be delayed, he may record his reasons and forward the reference to the High Court at once without making any inquiry of the prisoner whether he wishes to appeal. In no case, however, requiring confirmation can the High Court grant a longer time for the presentation of an appeal than is allowed under Section 271, *i. e.*, one week. No second appeal lies to the High Court on points of law as is now virtually allowed by way of motion under the law now in force.

By Section 272, no appeal lies from a judgment of acquittal passed in any Criminal Court, but the Local Government may direct an appeal by the public prosecutor or other officer, specially or generally appointed in their behalf from an Original or Appellate judgment of acquittal. Such appeal lies to the High Court, and no rules of limitation apply to such appeals.

Section 273 provides that no appeal shall lie in cases in which a Court of Session or the magistrate of a district or other magistrate of the first class passes a sentence of imprisonment not exceeding one month, or of fine not



exceeding fifty rupees only or of whipping only.

There is no appeal from a sentence of imprisonment passed by such court or officer in default of payment of fine when no substantive sentence of imprisonment has been passed.

There is no appeal also except as to the legality or extent of the sentence where the accused has been convicted on his own plea either on a trial by Jury or by Assessors.

Section 274 shuts all appeals from what is called summary convictions arrived at by a magistrate of the district or a magistrate or Bench of Magistrates invested with the powers of a magistrate of the first class, in which the sentence is for imprisonment for a term not exceeding three months only or for fine not exceeding two hundred rupees only or of whipping only.

An appeal however is allowed where the punishment is of a cumulative character, that is where two or more of the punishments referred to in Sections 273 and 274, namely, imprisonment, fine, and whipping, are combined together, but not against a sentence in which imprisonment is awarded in default of payment of fine or in addition thereto, nor against any sentence which would not be otherwise liable to appeal, because the person convicted is ordered to find security to keep the peace.

The provisions of this and the last preceding section shall not apply to appeals from orders passed on European British subjects under sections seventy-four or seventy-six.

Section 278 lays down the course to be adopted by the Appellate Court, in rejecting an appeal, and leaves it entirely at the option of such Court to call for and peruse all or any part of the proceedings of the Lower Court.

Section 280 empowers the Appellate Court to alter or reverse the finding, sentence or order of the Lower Court, and if it see reason to do so, to enhance any punishment that has been awarded.

The Section provides that if the appeal

is from the sentence of a magistrate of *any class*, the Appellate Court shall not inflict a greater punishment than might have been inflicted by a magistrate of the *first class*.

Now, Section 272 embodies a novel provision, giving as it does a right of appeal on behalf of Government by an officer, called the Public Prosecutor and that whenever it may suit his convenience, may be after the lapse of 20 years or more, in all cases in which a prisoner may be acquitted by a court of competent jurisdiction. No reason is assigned for the assertion of this extraordinary prerogative. We are accordingly left to grope in the dark. Can it be to make the people sensible of the superior importance of "the powers that be?" Whatever may be the reason, we are quite sure that the provision is calculated to work no end of mischief. No body who had for once the misfortune to have a criminal charge trumped up against him could rest, although he may have been honorably acquitted,—with the self-complaisant consciousness that his innocence had been fully vindicated before a proper tribunal and that he was safe for all time to come. No, he may be summoned any moment to appear again to take his trial before another Court, perhaps to be convicted this time of the charge which had been originally laid against him. He must always remain in a state of awful anxiety with the sword of Damocles suspended over his head. What may be the object of Government in thus subjecting people, who have been pronounced "Not guilty" by proper tribunals, to this perpetual mental torment is certainly a problem which admits of no easy solution. At all events we are quite sure, this section will be admitted on all hands to be objectionable in the extreme.

Sections 273 and 274 by which no appeals are allowed in certain cases, as we have already set forth, do not apply to European British subjects, why or wherefore we are at no great loss to imagine. We have already pointed out the invidious nature of the distinction



which this law makes between the different classes of Her Majesty's subjects in this country, and we repeat that the sooner these distinctions are done away with, the better for the honor of the Government which is pledged to do justice between man and man without fear or favor.

Section 278 gives the Appellate Courts power to reject an appeal without sending for the record. Really we cannot reconcile ourselves to the idea of seeing justice done in this new-fangled and off-hand fashion. Courts surely ought to be impressed with a full sense of the responsibility which attaches to the duty with which they are entrusted, but if the Legislature choose to give such wide latitude to their discretion, it is ten to one that such discretion will be abused in the most flagrant manner. The discretion which Courts have to exercise is to be sure "a judicial discretion," but we know in what sense this discretion is understood by the majority of our judicial officers. We are not quite sure whether with many officers "discretion" is not synonymous with "caprice." Be that however as it may, we are free to confess, that we cannot quite realize the idea of a Court doing justice in appeal in a criminal case without sending for the record. Abstract questions of law do not certainly require a reference to the facts which the record may disclose, but we think, that in cases which involve questions of life and liberty of the subject, it is always safe to have the record of the case at hand to enable the Court to refer to it when necessary.

Section 280 exhibits the concentrated essence of Legislative wisdom inasmuch as it contains the most effective provision for putting virtually a stop to all appeals. For, can it be believed for a moment, that even an innocent person will venture to appeal when the chances of acquittal or mitigation of sentence on the one hand are quite equal to those of an enhancement of sentence on the other? No body, we verily believe, will undertake the risk. An appeal under this law is a game of chance at which, we are almost sure, very few will choose to try

their hands. This section, we fear, is a retrograde movement in legislation. A similar provision existed in the law more than quarter of a century ago, but as it was found to be unsuited to the spirit of the age, it was thought proper to rescind it. The present Legislature have however thought otherwise and seen the propriety of re-enacting it. May the shadows of the Honorable Members never grow less!!! One restriction however has been put on the power of the Appellate Court, namely, that it shall not be competent to inflict a greater punishment than might have been inflicted by a magistrate of the first class in cases in which the appeal is from the sentence of a magistrate of any class, that is, in cases originally tried by magistrates of the second or third class, it can inflict punishment higher than what such magistrates could have themselves inflicted. This is certainly a very kind and considerate provision exhibiting as it does on the part of the Hon'ble Members of our Legislature not only a perfect familiarity with the most advanced and refined principles of criminal jurisprudence, but an earnest desire to engraft them bodily in the Statute Book of British India for the special behoof of the benighted millions of the country, the present instalment of legislation being only an earnest of what may be expected to follow at no very distant day.

Part VIII, Chapters XXXIV, and XXXV contain certain rules relative to the admissibility of, and the mode of recording evidence, which are certainly extraordinary in their kind.

By Section 323 the attendance of a medical witness may be dispensed with. We really fail to perceive the value of testimony which is not subjected to the crucial test of a cross-examination.

By Section 325, it is provided that the genuineness of a signature may be presumed. We do not understand why this presumption should be made and the signature not duly proved.

Section 326 lays down that a previous conviction or acquittal may be proved by an extract from the record certified under the hand of the clerk

or his deputy in charge of such record. We all know the worth of the Record-keeper of the Mofussil Courts, and therefore we cannot afford to think too highly of this provision. A certificate under the hand of such officers it is not at all difficult to produce.

Under Section 333 in Summons cases, &c., the Magistrate is to make a memorandum of the evidence of each witness, and under Section 384 in all other cases before a Magistrate and in proceedings before the Sessions Court, the evidence of each witness is to be taken down, in writing by, or in the presence and hearing and under the personal direction and superintendence of the Magistrate or the Sessions Judge.

We think that in every case the whole of the evidence should be recorded in English by the Magistrate or the Sessions Judge in his own handwriting. The matter ought not to be left to the discretion of those officers. It ought to be made compulsory. A mohurir may also take down the depositions *in extenso* in the vernacular language of the witness as is the practice at present. If in civil cases the Judges are obliged to take down the deposition in full of each witness in his own handwriting, we think that there ought to be no option left in this matter to the criminal authorities.

On the whole, the Act under notice does not appear to us to be a happy or a well conceived piece of legislation. Many of its provisions, as we have already pointed out, appear to be wholly repugnant to the spirit of an enlightened age, being calculated more to ensure conviction rightly or wrongly in every individual case that may happen to be brought before the Courts than to give fair play to all parties concerned.

It is said that this Act was passed to strengthen the hands of the executive. We think they are already too strong in the Mofussil, where public opinion is yet too weak to assert itself. We all know what a *Hakim* is in the country, where being "drest with a little brief authority he plays" even now as in the days of the poet "such fantastic tricks

before high heaven as make angels weep." If this Act should come into operation in all its entirety, there is no knowing where his vagaries would end.

Then again, this law perpetuates a distinction between the European British and the Native subjects of Her Majesty, which it is already high time should be at once done away with. "One law for the white and another for the black" is certainly a stigma upon the British rule, and the sooner therefore it is removed, the better for the honor of the Government.

The history of this law is also far from creditable to the Legislature. The Select Committee to which it had been referred, had it under their incubation for about a year and a half, and that process over, the Amended Bill was presented to the Council on 12th March last, and published for the first time in a Gazette of India Extraordinary on the 28th idem, and after the same together with a supplementary report had been considered in Committee of the whole Council it was passed into law on 16th April last. Thus the public had no time to express their general sense upon a measure which so closely affected the rights and liberties of Her Majesty's lieges in the interior of the country. It was passed into law with such hot haste that there was no time left even for translating the Bill as is customary, in the vernacular languages of the country for general information. Really this was an extraordinary proceeding. What were the peculiar circumstances which rendered this necessary, we cannot, for the life of us, imagine. But as wise men have more to do with the present and the future than the past, we trust the Council with Lord Northbrook at their head will reconsider the Act with reference to our remarks, and make such alterations and amendments as the spirit of the age, and the improved and still improving state of the country may seem to require.

We have to acknowledge with thanks the receipt of the first two numbers of *Mookerjee's Magazine*, as well as the *Bengal Magazine* for August and September.

## SCHEDULE.

Number and Year.	TITLE.	Extent of Repeal.
Stat. 26 Geo. III, c. 57 ...	For the further regulation of the trial of persons accused of certain offences committed in the East Indies; for repealing so much of an Act, made in the twenty-fourth year of the reign of his present Majesty (intituled, An Act for the better regulation and management of the affairs of the East India Company, and of the British possessions in India, and for establishing a court of judicature for the more speedy and effectual trial of persons accused of offences committed in the East Indies), as requires the servants of the East India Company to deliver inventories of their estates and effects; for rendering the laws more effectual against persons unlawfully resorting to the East Indies; and for the more easy proof, in certain cases, of deeds and writings executed in Great Britain or India.	Section thirty-eight so far as it relates to Courts of Justice in the East Indies.
Stat. 14 & 15 Vic., c. 99 ...	To amend the Law of Evidence.	Section eleven and so much of section nineteen as relates to British India.
Act XV of 1852 ...	To amend the Law of Evidence.	So much as has not been heretofore repealed.
Act XIX of 1853 ...	To amend the Law of Evidence in the Civil Courts of the East India Company in the Bengal Presidency.	Section nineteen.
Act II of 1855 ...	For the further improvement of the Law of Evidence.	So much as has not been heretofore repealed.
Act XXV of 1861.	For simplifying the Procedure of the Courts of Criminal Judicature not established by Royal Charter.	Section two hundred and thirty-seven.
Act I of 1868 ...	The General Clauses Act, 1868.	Section seven and eight.

## ACT No. II OF 1872.

(Received the assent of the Governor-General on the 22nd March 1872.)

*An Act to revive and continue the operation of Act XV of 1867 (to make better provision for the appointment of Municipal Committees in the Punjab, and for other purposes.)*

**WHEREAS** the term for which Act XV of 1867 was enacted to be in force has expired, and it is expedient to revive and continue the operation of the said Act; It is hereby enacted as follows:—

1. Act XV of 1867 shall be deemed to be and to have been in force throughout the territories subject to the control of the Lieutenant-Governor of the Punjab from the last day of February 1872, and shall continue in force in the said territories until the first day of March 1873.

Revival and continuance of Act XV of 1867.

## ACT No. III OF 1872.

(Received the assent of the Governor-General on the 22nd March 1872.)

*An Act to provide a form of Marriage in certain cases.*

**WHEREAS** it is expedient to provide a form of marriage for persons who do not profess the Christian, Jewish, Hindú, Muhammedan, Parsee, Buddhist, Sikh, or Jaina religion, and to legalize certain marriages the validity of which is doubtful; It is hereby enacted as follows:—

Preamble.

**1.** This Act extends to the whole of British India, and shall come into force on the passing thereof.

Local extent.

Commencement.

**2.** Marriages may be celebrated under this Act between persons neither of whom professes the Christian or the Jewish or the Hindú or the Muhammedan, or the Parsee, or the Buddhist, or the Sikh, or the Jaina religion, upon the following conditions:—

Conditions upon which marriages under Act may be celebrated.

(1).—Neither party must, at the time of the marriage, have a husband or wife living:

(2).—The man must have completed his age of eighteen years, and the woman her age of fourteen years, according to the Gregorian calendar:

(3).—Each party must, if he or she has not completed the age of twenty-one years, have obtained the consent of his or her father or guardian to the marriage:

(4).—The parties must not be related to each other in any degree of consanguinity or affinity which would, according to any law to which either of them is subject, render a marriage between them illegal.

**1st Proviso.**—No such law or custom, other than one relating to consanguinity or affinity, shall prevent them from marrying.

**2nd Proviso.**—No law or custom as to consanguinity shall prevent them from marrying unless a relationship can be traced between the parties through some common ancestor, who stands to each of them in a nearer relationship than that of great-great-grand-father or great-great-grand-mother, or unless one of the parties is the lineal ancestor, or the brother or sister of some lineal ancestor, of the other.

**3.** The Local Government may appoint one or more Registrars under this Act, either by name or as holding any office for the time being, for any portion of the territory subject to its administration. The officer so appointed shall be called 'Registrar of Marriages under Act III of 1872,' and is hereinafter referred to as 'the Registrar.' The portion of territory for which any such officer is appointed shall be deemed his district.

**4.** When a marriage is intended to be solemnized under this Act, one of the parties must give notice in writing to the Registrar, before whom it is to be solemnized.

One of the parties to intended marriage to give notice to Registrar.

The Registrar to whom such notice is given, must be the Registrar of a district within which one at least of the parties to the marriage has resided for fourteen days before such notice is given.

Such notice may be in the form given in the first schedule to this Act.

5. The Registrar shall file all such notices

Notice to be filed  
and copy entered in  
the Marriage Notice  
Book.

and keep them with the records of his office, and shall also forthwith enter a true copy of every such notice in a book to be for that purpose furnished to him by the Government, to be called the "Marriage Notice Book under Act III of 1872," and such book shall be open at all reasonable times, without fee, to all persons desirous of inspecting the same.

6. Fourteen days after notice of an intended marriage has been given

Objection to Marriage.

under section four, such marriage may be solemnized, unless it has been previously objected to in the manner hereinafter mentioned.

Any person may object to any such marriage on the ground that it would contravene some one or more of the conditions prescribed in clauses (1), (2), (3), or (4) of section two.

The nature of the objection made shall be recorded in writing by the Registrar in the register, and shall, if necessary, be read over and explained to the person making the objection, and shall be signed by him or on his behalf.

7. On receipt of such notice of objection

Procedure on receipt of objection.

the Registrar shall not proceed to solemnize the marriage until the lapse of fourteen days from the receipt of such objection, if there be a Court of competent jurisdiction open at the time, or, if there be no such Court open at the time, until the lapse of fourteen days from the opening of such Court.

The person objecting to the intended marriage

Objector may file suit.

may file a suit in any Civil Court having local jurisdiction (other than a Court of Small Causes) for a declaratory decree, declaring that such marriage would contravene some one or more of the conditions prescribed in clauses (1), (2), (3), or (4) of section two.

8. The officer before whom such suit is

Certificate of filing  
of suit to be lodged  
with Registrar.

filed shall thereupon give the person presenting it a certificate to the effect that such suit has been filed. If such certificate be lodged with the Registrar within fourteen days from the receipt of notice of objection, if there be a Court of competent jurisdiction open at the time, or, if

there be no such Court open at the time, within fourteen days of the opening of such Court, the marriage shall not be solemnized till the decision of such Court has been given and the period allowed by law for appeals from such decision has elapsed; or, if there be an appeal from such decision, till the decision of the Appellate Court has been given.

If such certificate be not lodged in the manner and within the period prescribed in the last preceding paragraph, or if the decision of the Court be that such marriage would not contravene any one or more of the conditions prescribed in clauses (1), (2), (3) or (4) of section two, such marriage may be solemnized.

If the decision of such Court be that the marriage in question would contravene any one or more of the conditions prescribed in clauses (1), (2), (3), or (4) of section two, the marriage shall not be solemnized.

9. Any Court, in which any such suit as

Court may  
fine when objection not reasonable.

is referred to in section seven is filed, may, if it shall appear to it that the objection was not reasonable and *bona fide*, inflict a fine, not exceeding one thousand rupees, on the person objecting, and award it, or any part of it, to the parties to the intended marriage.

10. Before the marriage is solemnized,

Declaration by parties and witnesses.

the parties and three witnesses shall, in the presence of the Registrar, sign a declaration in the form contained in the second schedule to this Act. If either party has not completed the age of twenty-one years, the declaration shall also be signed by his or her father or guardian, except in the case of a widow, and, in every case, it shall be countersigned by the Registrar.

11. The marriage shall be solemnized in

Marriage how to be solemnized.

the presence of the Registrar and of the three witnesses who signed the declaration. It may be solemnized in any form, provided that each party says to the other, in the presence and hearing of the Registrar and witnesses, 'I, [A,] take thee, [B,] to be my lawful wife (or husband).'

12. The marriage may be celebrated

Place where marriage may be solemnized.

either at the office of the Registrar or at such other place, within reasonable distance of the office of the Registrar, as the

parties desire. Provided that the Local Government may prescribe the conditions under which such marriages may be solemnized at places other than the Registrar's office, and the additional fees to be paid thereupon.

13. When the marriage has been solemnized, the Registrar shall

*Form of certificate.*

enter a certificate thereof in a book to be kept by him for that purpose and to be called the 'Marriage Certificate Book under Act III of 1872,' in the form given in the third schedule to this Act, and such certificate shall be signed by the parties to the marriage and the three witnesses.

14. The Local Government shall prescribe the fees to be paid to the

*Fees.*

Registrar for the duties to be discharged by him under this Act.

The Registrar may, if he think fit, demand payment of any such fee before solemnization of the marriage or performance of any other duty in respect of which it is payable.

The said marriage Certificate Book shall at all reasonable times be open for inspection, and shall be admissible as evidence of the truth of the statements therein contained. Certified extracts therefrom shall on application be given by the Registrar on the payment to him by the applicant of a fee to be fixed by the Local Government for each such extract.

15. Every person who, being at the time

*Penalty on married person marrying again under Act.*

married, procures a marriage of himself to be solemnized under this Act, shall be deemed to have committed an offence under section four hundred and ninety-four or section four hundred and ninety-five of the Indian Penal Code, as the case may be; and the marriage so solemnized is void.

16. Every person married under this Act

*Punishment of bigamy.*

who, during the lifetime of his or her wife or husband, contracts any other marriage, shall be subject to the penalties provided in sections four hundred and ninety-four and four hundred and ninety-five of the Indian Penal Code for the offence of marrying again during the lifetime of a husband or wife, whatever may be the religion which he or she professes at the time of such second marriage.

17. The Indian Divorce Act shall apply

*Indian Divorce Act to apply.*

to all marriages contracted under this Act, and any such marriage may be declared null or dissolved in the manner therein provided, and for the causes therein mentioned, or on the ground that it contravenes some one or more of the conditions prescribed in clauses (1), (2), (3), or (4) of section two of this Act.

18. The issue of marriages solemnized

*Law to apply to issue of marriages under Act.*

under this Act shall, if they marry under this Act, be deemed to be subject to the law to which their fathers were subject as to the prohibition of marriages by reason of consanguinity and affinity, and the provisoes to section two of this Act shall apply to them.

19. Nothing in this Act contained shall

*Saving of marriages solemnized otherwise than under Act.*

affect the validity of any marriage not solemnized under its provisions; nor shall this Act be deemed directly or indirectly to affect the validity of any mode of contracting marriage; but if the validity of any such mode shall hereafter come into question before any Court, such question shall be decided as if this Act had not been passed.

20. All persons who have heretofore con-

*Registry of marriages contracted before passing of Act.*

tracted marriages in the presence of at least two witnesses, according to any form whatever, may at any time, previous to the first day of January 1873, have such marriages registered under this Act, and such marriages shall thereupon be deemed to be and to have been as valid as if they had been contracted and solemnized under this Act: Provided that persons who have such marriages registered under this section must, on such registry, sign a declaration in the form given in the fourth schedule to this Act.

No marriage shall be registered under this section unless conditions (1), (3), and (4) of section two were complied with; and no such marriage shall be registered under this section if, during its continuance, either party has contracted a subsequent marriage.

21. Every person making, signing, or at-

*Penalty for signing declarations or certificates containing false statements.*

testing any declaration or certificate prescribed by this Act, containing a statement which is false, and which he

either knows or believes to be false, or does not believe to be true, shall be deemed guilty of the offence described in section one hundred and ninety-nine of the Indian Penal Code.

### FIRST SCHEDULE.

(See Section 4).

#### NOTICE OF MARRIAGE.

To *a Registrar of Marriages*  
under Act III. of 1872 for the *District.*

I hereby give you notice that a marriage under Act III. of 1872, is intended to be had, within three calendar months from the date hereof, between me and the other party herein named and described (that is to say) :—

Names.	Condition.	Rank or profession.	Age.	Dwelling place.	Length of residence.
<i>A B</i>	<i>Unmarried. Widower.</i>	<i>Landowner.</i>	<i>Of full age.</i>	<i>.....</i>	<i>23 days.</i>
<i>C D</i>	<i>Spinster.</i>	<i>.....</i>	<i>Minor.</i>	<i>.....</i>	<i>.....</i>

Witness my hand, this                      day of  
187                      (Signed) *A. B.*

### SECOND SCHEDULE.

(See Section 10).

*Declaration to be made by the Bridegroom.*

I, *A B*, hereby declare as follows :—

1. I am at the present time unmarried :

2. I do not profess the Christian, Jewish, Hindú, Muhammán, Parsi, Buddhist, Sikh, or Jaina religion.

3. I have completed my age of eighteen years :

4. I am not related to *C D* [*the bride*] in any degree of consanguinity or affinity which would, according to the law to which I am subject, or to which the said *C D* is subject, and subject to the provisos of clause (4) of section two of Act III. of 1872, render a marriage between us illegal :

[*And when the bridegroom has not completed his age of twenty-one years :*

5. The consent of my father [*or guardian, as the case may be*] has been given to a marriage between myself and *C D*, and has not been revoked.]

6. I am aware that, if any statement in this declaration is false, and if in making such statement I either know or believe it to be false, or do not believe it to be true, I am liable to imprisonment, and also to fine.

(Signed) *A B* (*the bridegroom*).

*Declaration to be made by the Bride.*

I, *C D*, hereby declare as follows :—

1. I am at the present time unmarried :

2. I do not profess the Christian, Jewish, Hindú, Muhammán, Parsi, Buddhist, Sikh, or Jaina religion.

3. I have completed my age of fourteen years :

4. I am not related to *A B* [*the bridegroom*] in any degree of consanguinity or affinity which would, according to the law to which I am subject, or to which the said *A B* is subject, and subject to the provisos of clause (4) of section two of Act III. of 1872, render a marriage between us illegal.

[*And when the bride has not completed her age of twenty-one years, unless she is a widow :*

5. The consent of *M N* my father [*or guardian, as the case may be*], has been given to a marriage between myself and *A B*, and has not been revoked.]

6. I am aware that, if any statement in this declaration is false, and if in making such statement I either know or believe it to be false, or do not believe it to be true, I am liable to imprisonment, and also to fine.



Signed in our presence by the above-named  
A B and C D :

G H, }  
I J, } (three witnesses).  
K L, }

[And when the bridegroom or bride has not  
completed the age of twenty-one years, except  
in the case of a widow :

Signed in my presence and with my con-  
sent by the above A B and C D :

M N, the father [or  
guardian] of the above-  
named A B [or C D, as  
the case may be.]

(Countersigned) E F,

Registrar of Marriages under Act III. of  
1872 for the District of

Dated the day of 18 .

### THIRD SCHEDULE.

(See Section 13).

Registrar's Certificate.

I, E F, certify that, on the of  
18, appeared before me A B and C D,  
each of whom in my presence and in the pre-  
sence of three credible witnesses, whose  
names are signed hereunder, made the declara-  
tions required by Act III. of 1872, and\* that  
a marriage under the said Act was solemnized  
between them in my presence.

(Signed) E F,

Registrar of Marriages under Act III.  
of 1872 for the District of

(Signed) A B,  
C D.

G H, }  
I J, } (three witnesses).  
K L, }

Dated the day of 18 .

### FOURTH SCHEDULE.

(See Section 20).

Declaration to be made by the Husband.

I, A B, hereby declare as follows :—

1. I was married to C D at (place), on  
or about (date) in the presence of (two wit-  
nesses):  
the

2. I was, at the time of my marriage to  
my wife, C D, unmarried :

3. I did not at such time profess the  
Christian, Jewish, Hindu, Muhammadan,  
Parsi, Buddhist, Sikh, or Jaina religion :

4. I have not contracted any subsequent  
marriage :

5. I am not related to C D [the wife] in  
any degree of consanguinity or affinity which  
would, according to the law to which I am  
subject, or to which the said C D is subject,  
and subject to the provisos of clause (4) of  
Section two of Act III. of 1872, render a  
marriage between us illegal :

[And when the bridegroom had not com-  
pleted his age of twenty-one years :

6. The consent of my father or guardian  
as the case may be], had been given to a  
marriage between myself and C D, and had  
not been revoked.]

7. I am aware that, if any statement in  
this declaration is false, and if in making  
such statement I either know or believe it to  
be false, or do not believe it to be true, I am  
liable to imprisonment, and also to fine.

(Signed) A B (the husband).

Declaration to be made by the Wife.

I, C D, hereby declare as follows :—

1. I was married to A B at (place), on or  
about (date) in the presence of (two wit-  
nesses) :

2. I was, at the time of my marriage to  
my husband, A B, unmarried :

3. I did not at such time profess the  
Christian, Jewish, Hindu, Muhammadan,  
Parsi, Buddhist, Sikh, or Jaina religion :

4. I have not contracted any subsequent  
marriage :

5. I am not related to A B [the husband]  
in any degree of consanguinity or affinity  
which would, according to the law to which  
I am subject, or to which the said A B is  
subject, and subject to the provisos of clause  
(4) of section two of Act III of 1872, render  
a marriage between us illegal.

[And when the bride had not, at the time of  
her marriage, completed her age of twenty-one  
years, unless she was then a widow :

6. The consent of M N my father [ or  
guardian, as the case may be ] had at such  
time been given to a marriage between my-  
self and A B, and had not been revoked :

7. I am aware that, if any statement in this declaration is false, and if in making such statement I either know or believe it to be false, or do not believe it to be true, I am liable to imprisonment, and also to fine.

Signed in our presence by the abovenamed  
A B and C D :

G H, } (two witnesses).  
I J, }

(Countersigned) E F,

Registrar of Marriages under Act III.

of 1872 for the District of

Dated the      day of      18      .

H. S. CUNNINGHAM,

Offg. Secy. to the Council of the

Govr.-Genl. for making Laws

and Regulations.

## ACT No. IV. OF 1872.

(Received the assent of the Governor-General  
on the 28th March 1872.)

### THE PUNJAB LAWS ACT, 1872.

An Act for declaring which of certain rules, laws, and regulations have the force of law in the Punjab, and for other purposes.

WHEREAS certain rules, laws, and regulations, made heretofore for the Punjab, acquired the force of law under the provisions of section twenty-five of the "Indian Council's Act, 1861," and whereas it is expedient to declare which of the said rules, laws, and regulations shall henceforth be in force in the Punjab, and to amend, consolidate, or repeal others of the said rules, orders, and regulations; It is hereby enacted as follows:—

Short title.

1872."

1. This Act may be called  
"The Punjab Laws Act,

2. It extends to the territories now under  
the administration of the

Local extent. Lieutenant-Governor of the  
Punjab, but not so as to alter the effect of

any regulations made for any parts of the said territories under the Statute 33 Vic., c. 3, s. 1;

Commencement.

And it shall come into  
force on the first day of June  
1872.

3. The Regulations, Acts, and orders  
Enactments in specified in the first schedule  
force. hereto annexed are in force  
in the Punjab to the extent specified in the  
third column of the said schedule.

4. The Regulations, Acts, and orders  
Enactments re-specified in the second sche-  
dule. dule hereto annexed are re-  
pealed to the extent specified in the third  
column thereof.

### CIVIL JUDICATURE.

5. In questions regarding inheritance,  
special property of females,  
Decisions in cer- betrothal, marriage, dower,  
tain cases to be according to Native adoption, guardianship, mino-  
Law. rity, bastardy, family rela-  
tions, wills, legacies, gifts, partition, or any  
religious usage or institution,  
the rule of decision shall be—

(1) any custom of any body or class of  
persons, which is not contrary to justice,  
equity, and good conscience, and has not been  
declared to be void by any competent  
authority,

(2) the Mahomedan law, in cases where  
the parties are Mahomedans, and the Hindoo  
law, in cases where the parties are Hindoos,  
except in so far as such law has been altered  
or abolished by legislative enactment, or is  
opposed to the provisions of this Act, or has  
been modified by any such custom as is re-  
ferred to in the preceding clause of this  
section.

6. In cases not otherwise specially  
provided for, the Judges  
Decisions in cases shall decide according to  
not specially pro- justice, equity, and good  
vided for. conscience.

7. All local customs and mercantile  
usages shall be regarded as  
Local customs and mercantile usages valid, unless they are con-  
when valid. trary to justice, equity or  
good conscience, or have, before the passing  
of this Act, been declared to be void by any  
competent authority.

## DESCENT OF JAGHIERS.

8. In all cases in which Government has declared any rule of descent to prevail in any family or families of assignees of land-revenue, such rule of descent shall be held to prevail, and to have prevailed, amongst them from the time when the declaration was made.

*Rule of descent in family of assignees of land-revenue.*

## PRE-EMPTION.

9. The right of pre-emption is a right on the part of certain persons to purchase immovable property in certain cases in preference to all other persons.

*Right of pre-emption defined.*

10. The right of pre-emption extends to all permanent dispositions of property, including sales under a decree of Court and foreclosures of mortgages; but it does not affect transfers made in good faith by way of gift, nor temporary dispositions of property.

*To what transactions it extends.*

11. The right of pre-emption shall be presumed to exist, whether recorded in the list of customs at settlement or not, in all village communities however constituted, unless the existence of any custom or contract to the contrary can be proved. It shall be presumed to extend to the village site, to the houses built upon it, to all lands and shares of lands within the village boundary and to all transferable rights of occupancy affecting such lands.

*Presumption of its existence in village communities.*

12. The right of pre-emption shall not be presumed, but may be shown, to exist in any town or city or any sub-division thereof.

*Its existence in towns to be proved.*

13. When any person proposes to sell any property, or to foreclose a mortgage upon any property which is subject to the custom of pre-emption, he must give notice to the persons concerned of the price at which he offers to sell such property, or of the amount due in respect of such mortgage, as the case may be.

*Notice to persons concerned, by vendor or mortgagee of property subject to right.*

14. If the property to be sold is situated within, or is a share of, a village, the right to accept such offer or to redeem such mortgage belongs, in the absence of custom to the contrary,

*Devolution of right when property to be sold is part of a village.*

First, to co-sharers in the village in order of relationship to the vendor or mortgagor;

Secondly, if no relation of the vendor or mortgagor claim pre-emption, to the land-owners of the puttee or other sub-division of the village in which the property is situated, jointly;

Thirdly, to any member of the village community;

Fourthly, to tenants with rights of occupancy in the village, if any.

15. If the property to be sold is a share in joint undivided immovable property, other than land, the offer to sell must be made to the co-sharers.

*Share of certain immovable property to be offered to co-sharers.*

16. When any question arises between persons claiming a right of pre-emption over any immovable property situated in any town or city, such questions shall, in the absence of custom to the contrary, be decided according to vicinity, relationship, or the merits of the case.

*Decision of questions between persons claiming right in respect of immovable property in towns.*

17. Any person who claims a right of pre-emption over any property, may bring a suit against the vendor or purchaser on the ground, either that no previous offer of the property sold was made to him, or that any such offer to sell made to him was not made in good faith; and if the Court is of opinion that the plaintiff has a right of pre-emption over such property, and that no such offer was made or that the offer was not made in good faith, it shall make a decree directing the defendant to sell such property to the plaintiff at such a price as appears to the Court to be the fair market-value of the property.

*Suit against vendor or purchaser by person claiming right, to whom no bona fide offer of the property sold was made.*

18. The decree shall specify a day on or before which the purchase-money shall be paid. If the purchase-money is not paid before sunset on that day, the decree shall become void, and the plaintiff shall lose his right of pre-emption over the property to which it relates.

*Decree what to contain.*

*Effect of non-payment of purchase-money on date fixed by decree.*

19. In case of sale by joint owners, no person who has been a party can withdraw his own share and claim a right of pre-emption as to the rest.

Party to sale by joint owners cannot withdraw his share and claim pre-emption as to rest.

20. In villages in which the Chowkedaree tenure prevails, the co-sharers in a well have a right of pre-emption as to shares in such well in preference to a general proprietor in any such village, having no share in the well but merely receiving a huq zemindaree from the "chowkedars."

Preferential right of co-sharers in well where chowkedaree tenure prevails.

#### DECREES CONCERNING LAND.

21. Every Judge of a Civil Court in which a decree affecting the proprietary right in or possession of land is passed, shall cause a certified copy of such decree to be forwarded to the Deputy Commissioner of the district within a month from the making of such decree.

Copy of decrees affecting land to be forwarded to Deputy Commissioner.

#### INSOLVENCY.

22. The Local Government may invest any Court or any class of Courts with insolvency jurisdiction in any specified local area.

Power to invest Courts with insolvency jurisdiction.

23. Any debtor, whose debts amount to Rupees five hundred or upwards, and any creditor or creditors, to whom an aggregate sum of not less than rupees five hundred is due from any such debtor, may petition the Court having local insolvency jurisdiction that the debtor be adjudicated an insolvent.

Petition to Court for adjudication of insolvency.

24. If it appear that the debtor's liabilities amount to more than Rupees five hundred, the Court may—

Procedure of Court thereupon.

(1) call upon the debtor to make a statement of his assets and liabilities;

(2) invite by proclamation or otherwise the appearance of persons to record claims against the debtor;

(3) register all claims so recorded;

(4) call upon the debtor to give reasonable security for his appearance, or on default of reasonable security, order his confinement in the civil jail.

(5) attach all the debtor's property in the Punjab, moveable or immoveable;

(6) pass an order exempting the person and property of the debtor from further legal process, pending inquiry and the final orders of the Court.

A debtor on whom the order referred to in clause six of the last preceding section is passed, is deemed an insolvent.

Insolvent defined.

25. The Court, shall make full enquiry into the origin, nature, and circumstances of the debts, and the conduct of the debtor in relation thereto; and if the insolvent be shown to have been guilty of concealment, fraud, recklessness, or other gross misconduct in reference to the debts, and if his discharge, for that reason, is opposed by any of the creditors, the Court may, at its discretion, award a term of imprisonment in the civil jail not exceeding one year.

Insolvent guilty of misconduct may be imprisoned.

26. If it appear that the debtor, after becoming unable to meet his liabilities, or in expectation of becoming so, has transferred his property, or any part thereof, with a view to defrauding his creditors, or to giving one or more creditors a fraudulent preference over the others, the Court shall annul such transfer, and treat the property transferred as the other property of the debtor.

Fraudulent transfers in expectation of insolvency may be annulled.

27. The property of the insolvent shall be sold or administered, under the direction of the Court, either through the agency of its own officers or of assignees to be appointed by the Court, in the manner most conducive to the interest of the creditors, and the proceeds shall be divided rateably amongst them.

Power of Court to sell or administer insolvent's estate.

28. The Court shall give effect to any composition or arrangement agreed upon between the debtor and the majority of the creditors: Provided that no injustice or injury appears to be inflicted by such composition or arrangement on any of the parties concerned, and that no fraud nor collusion is suspected. If any creditor objects to such arrangement the Court shall decide as to the reasonableness of the objection.

Power to give effect to compositions.

### 29. When the sale or administration of

When Court may order discharge of insolvent, the insolvent's property is complete, the Court may order the insolvent to be discharged, on his signing an agreement to liquidate from any property which he may subsequently acquire, such portion of his debts as remains unpaid. Such order of discharge shall preclude any creditor whose claim is registered from suing the debtor in respect of such claim, unless it be shown that the debtor has acquired property, since the order of discharge, out of which the claim might have been defrayed.

Effect of order. Nothing in the preceding sections shall apply to persons who may have been admitted to the benefit of any insolvency law at a presidency town; nor shall any order passed under the preceding sections affect the remedy of any creditor against his debtor in respect of property which, at the time of insolvency of such debtor, was not in the Punjab.

Foregoing rules not to apply to persons admitted to benefit of insolvency law in presidency towns. 30. Nothing in the preceding sections shall apply to persons who may have been admitted to the benefit of any insolvency law at a presidency town; nor shall any order passed under the preceding sections affect the remedy of any creditor against his debtor in respect of property which, at the time of insolvency of such debtor, was not in the Punjab.

Chief Court empowered to frame rules. 31. The Chief Court of the Punjab may, with the sanction of the Local Government, from time to time, frame and issue rules, conformable to the provisions hereinbefore contained, for the better administration of insolvent estates, and may with the like sanction alter any such rules.

Power to exclude any class from operation of such rules. 32. The Local Government may at any time, with the previous sanction of the Governor-General in Council, exclude any particular class or race from the operation of these rules.

Saving of previous insolvency proceedings. 33. No proceedings of any Court in the exercise of insolvency jurisdiction, had before the passing of this Act, shall be held to have been invalid solely on the ground that such Court did not possess such jurisdiction; all cases pending in any Court of Insolvency when this Act comes into force, shall be subsequently conducted, so far as may be, in conformity with the rules now prescribed.

### MINORS AND THE COURT OF WARDS.

Deputy Commissioners to be Courts of Wards. 34. Deputy Commissioners shall be Courts of Wards within their respective districts, but shall exercise the functions of such

Courts subject to the control of the Commissioner and Financial Commissioner.

35. The Court of Wards may, at its discretion, take charge of and administer the estates of all females, all minors under the age of eighteen, and idiots or lunatics, who may inherit any beneficial interest in any estate for which a settlement was made with their ancestor, or in respect of which they would have been entitled to be settled with, if they had been competent to make an agreement for the payment of revenue, or who are entitled by inheritance to any assignment of land-revenue.

Provided that the Court of Wards shall not take charge of or administer any beneficial interest in an estate, in which more persons than one have a joint undivided interest, unless all such persons are so circumstanced as to be subject to the Court of Wards.

36. The Deputy Commissioner may make an enquiry into the minority, lunacy, or idiocy of any person, who, he has reason to believe, would, if found to be a minor, lunatic, or idiot, be subject to the jurisdiction of the Court of Wards, and into the circumstances and property of any such person, and may make an order declaring such person to be subject to the jurisdiction of the Court of Wards.

Appeal to Commissioner against order under section 36. 37. Any such person may appeal to the Commissioner of the Division against any such order on the ground that he is not, or has ceased to be, a minor, or that he is not, or has ceased to be, a lunatic or idiot, and the decision of the Commissioner shall be certified to the Court of Wards, and shall be final.

Extent of jurisdiction. 38. The jurisdiction of the Court of Wards shall extend to the care and education, and to the management of the property, of the persons subject thereto; and the Local Government shall make rules as to the manner in which, and the agents by whom, such jurisdiction shall be exercised.

## CRIMINAL JUDICATURE.

39. The provisions of the Indian Penal

Indian Penal Code to apply to offences committed previous to first January 1862.

Code with the exception of Chapter VI. shall be applicable to all offences committed before first January 1862, in territory which was, at the time of the commission of such offence, subject to the Government of the Punjab.

Provided that nothing contained in this Section shall affect any privilege conferred on certain Chiefs in the Punjab by the Governor-General in Council, or by the Board of Administration for the affairs of the Punjab, nor any indemnity or pardon granted by competent authority.

Saving of privileges conferred on certain Chiefs.

## HONORARY POLICE OFFICERS.

40. The Local Government may, if it

Local Government may invest any person with powers of Police officer.

thinks fit, confer on any person any of the powers which may be exercised by a Police officer under any Act for the time being in force.

## TRACK LAW.

41. When an offence is, has been, or may

Trackers may call for assistance in carrying on tracks.

reasonably be supposed to have been, committed, and the tracks of the persons who may reasonably be supposed to have committed such offence, or of any animal or other property reasonably supposed to be connected with such offence, are followed to a spot within the immediate vicinity of a village, the person following such tracks may call upon any Headman or Village Watchman in such village to assist in carrying on the tracks.

42. If such Headman or Watchman do

Penalty for withholding assistance or conniving at offence or escape.

not forthwith give such assistance, or if the inhabitants of such village do not afford full opportunity for search in their houses for the offenders, or if, from the circumstances of the case, there shall appear good reason to believe that the inhabitants of such village, or any of them, were conniving at the offence or at the escape of the offenders, such offenders cannot be traced beyond the village, the Magistrate of the District may, with the previous sanction of the Commissioner of the Division, inflict a fine upon such village not exceeding five

hundred rupees, except in the case of stolen property over five hundred rupees in value, in which case the fine shall not exceed the value of such property.

An appeal against all convictions under this section shall lie to the Chief Court.

The Magistrate may direct that the fine imposed under this section or any part thereof, shall be awarded to any persons injured by such offence in compensation for such injury; and, in the case of stolen property recovered through the agency of a tracker, may direct that such property be not restored to its owner until he has paid to such tracker such fee, not exceeding one-fourth part of the value of the stolen property, as to the said Magistrate seems fit.

Limit to fine.

Fine may be awarded to injured parties, and fee to tracker.

## SLAUGHTER OF KINE.

43. The slaughter of kine and the sale

Control of slaughter of kine and sale of beef.

of beef shall not take place, except with the consent and subject to rules to be from time to time, either generally or in any particular instance, prescribed by the Local Government.

## ARMED MEN AND FOREIGN VAGRANTS.

44. No band of armed men shall enter

Control of entry into towns of bands of armed men.

into any city or town, except with the consent and subject to rules to be from time to time, either generally or in any particular instance, prescribed by the Local Government.

45. The Magistrate of the District may,

Powers of Magistrate of District as to foreign vagrants.

if he considers that any band of foreign vagrants is likely to occasion a breach of the peace or to commit any offence under the Indian Penal Code, prohibit such band from entering his district; or, if they are already in his district, may require them within a given time to leave it.

46. If any such band fail to comply with

Surveillance, &c., of band failing to comply with Magistrate's order.

the orders of the said Magistrate within the prescribed period, he shall report the matter to the Local Government, and the Local Government may give such directions for the surveillance, control,

or deportation of such band, as to it seems fit.

#### MISCELLANEOUS.

47. No person shall cross any river or stream on a buoy or inflated skin, nor shall have in his possession or custody any buoy or skin for the purpose of being used in crossing any river or stream, except with the consent and subject to rules to be from time to time, either generally or in any particular instance, prescribed by the Local Government.

48. No person shall make use of the pasture or other natural product of any land being the property of the Government, except with the consent and subject to rules to be from time to time, either generally or in any particular instance, prescribed by the Local Government.

49. No person shall grow, sell, or keep in his possession any opium, except with the consent and subject to rules to be from time to time either generally or in any particular instance, prescribed by the Local Government.

50. The Local Government may issue rules as to the matters mentioned in sections forty-three to forty-nine inclusive, and may, from time to time, cancel or alter any such rules.

Any person who breaks any rule made by the Local Government under this Act, shall be punishable with a fine not exceeding rupees fifty, or imprisonment not exceeding a period of six months, or with both :

Provided—

(1) that such rules be not inconsistent with the provisions of this or any Act or law for the time being in force in the Punjab ;

(2) that, previous to notification, they be sanctioned by the Governor-General in Council ;

(3) that they may be notified in the Local Gazette.

Existing rules upon the subjects hereinbefore mentioned shall, until otherwise directed by the Local Government, be deemed to have been issued under, and in conformity with, this section.

51. All rules which the Local Government is empowered to issue under this Act, and all circulars issued by the Chief Court, shall, with the previous sanction of the Governor-General in Council, be re-published once at least in every year and, upon such re-publication, shall be arranged in the order of their subject-matter ; and all such alterations or amendments as may have been made in the course of the preceding year, or may have become necessary or advisable, shall be embodied therewith ; and upon such re-publication all such rules and circulars, previously issued, shall be repealed.



## SCHEDULE I.

*Enactments declared to be in force.*

*Explanation.*—This Schedule does not refer to any Act which is in its terms applicable to the Punjab, or which has been extended to the Punjab by competent authority.

Number and Year.	TITLE.	Extent to which the Enactment is in force.
Reg. I of 1798 ...	A Regulation to prevent Fraud and Injustice in conditional Sales of Land under Deeds of Bye-bil-wuffa, or other Deeds of the same nature.	The whole, except such parts as relate to interest.
Reg. X of 1804 ...	A Regulation for declaring the Powers of the Governor General in Council to provide for the immediate Punishment of certain Offences against the State by the sentence of Courts Martial.	The whole, so far it is not modified by Act V of 1841.
Reg. XVII of 1806...	A Regulation for extending to the Province of Benares the Rates of Interest on future Loans, and Provisions relative thereto, contained in Regulation XV, 1798; also for a General extension of the period fixed by Regulations I, 1798; and XXXIV, 1803, for the Redemption of Mortgages and Conditional Sales of Land, under Deeds of Bye-bil-wuffa, Kutubaleh, or other similar designation.	Sections seven and eight.
Reg. V of 1817 ...	A Regulation for declaring the Rights of Government and of Individuals with respect to hidden Treasure, and for prescribing the Rules to be observed on the Discovery of such Treasure.	The whole.
Reg. III of 1818! ..	A Regulation for the Confinement of State Prisoners.	The whole.
Reg. XI of 1825 ...	A Regulation for declaring the Rules to be observed in determining Claims to Lands gained by alluvion, or by dereliction of a river or the sea.	The whole.
Reg. XX of 1825 ...	A Regulation for declaring the jurisdiction of the Military Courts Martial and Courts of Requests, constituted by a recent Act of Parliament, and for modifying some parts of the existing Regulations in conformity thereto.	Sections two and four.
Act XL of 1858 ...	An Act for making better provision for the care of the persons and property of minors in the Presidency of Fort William in Bengal.	The whole.
Act XVII of 1861...	An Act to amend Act XIV of 1843 (for regulating the Customs Duties in the North-Western Provinces).	The whole, the word "Punjab" being substituted for the words "North-Western Provinces."
	"Rules for the conservancy of Forests and Jungles in the Hill Districts of the Punjab Territories," sanctioned by the Governor-General in Council, in letter of the Secretary to the Government of India, No. 1789, 21st May 1855.	The whole.

## SCHEDULE II.

*Enactments repealed.*

Number and Year.	TITLE.	Extent of Repeal.
	All Bengal Regulations now in force in the Punjab, except those specified in schedule I.	The whole.
	All rules, laws and regulations made for the Punjab and its Dependencies or for any part thereof, by the Governor General of India, or the Governor General of India in Council, or the Lieutenant-Governor of the Punjab otherwise than at meetings for making laws and regulations in conformity with the provisions of the Acts of the 3rd and 4th years of King William the fourth, Chapter eighty-five, and of the 16th and 17th years of Her Majesty, Chapter ninety-five, or other Act in force for the time being, except those specified in schedule I.	The whole.
Act VI of 1846 ...	An Act for the more convenient administration of the Government of the country called the Bhuttees Territory.	The whole.
Act I of 1847 ...	An Act for the establishment and maintenance of Boundary-marks in the North-Western Provinces of Bengal.	The whole, so far as it affects the Punjab.
Act III of 1870 ...	An Act to remove the Agror Valley from the jurisdiction of the tribunals established under the general Regulations and Acts, and for other purposes.	The whole, so far as it is unrepealed.

# THE PUNJAB LAWS ACT, 1872.

## CONTENTS.

### Preamble.

#### SECTION.

1. Short title.
2. Local extent.  
Commencement.
3. Enactments in force.
4. Enactments repealed.

#### CIVIL JUDICATURE.

5. Decisions in certain cases to be according to Native law.
6. Decisions in cases not specially provided for.
7. Local customs and mercantile usages when valid.

#### DECENT OF JAGHEERS.

8. Rule of descent in family of assignee of land-revenue.

#### PRE-EMPTION.

9. Right of pre-emption defined.
10. To what transactions it extends.
11. Presumption of its existence in village communities.
12. Its existence in towns to be proved.
13. Notice to persons concerned, by vendor or mortgagee of property subject to right.
14. Devolution of right when property to be sold is part of a village.
15. Share of certain immovable property to be offered to co-sharers.
16. Decision of questions between persons claiming right in respect of immovable property in towns.
17. Suit against vendor or purchaser by person claiming right, to whom no *bona fide* offer of the property sold was made.
18. Decree what to contain.  
Effect of non-payment of purchase money on debt fixed by decree.
19. Party to sale by joint owners cannot withdraw his share and claim pre-emption as to rest.
20. Preferential right of co-sharers in well where chakdaree tenure prevails.

#### DECREES CONCERNING LAND.

21. Copy of decrees affecting land to be forwarded to Deputy Commissioner.

#### INSOLVENCY.

22. Power to invest Courts with insolvency jurisdiction.
23. Petition to Court for adjudication of insol-
24. Procedure of Court thereupon. [vency.  
Insolvent defined.
25. Insolvent guilty of misconduct may be imprisoned.
26. Fraudulent transfers in expectation of insolvency may be annulled.
27. Power of Court to sell or administer insolvent's estate.

#### SECTION.

28. Power to give effect to compositions.
29. When Court may order discharge of insolvent.  
Effect of order.
30. Foregoing rules not to apply to persons admitted to benefit of insolvency law in presidency towns.
31. Chief Court empowered to frame rules.
32. Power to exclude any class from operation of such rules.
33. Saving of previous insolvency proceedings.  
MINORS AND THE COURT OF WARDS.
34. Deputy Commissioners to be Courts of Wards.
35. Jurisdiction of Court of Wards.  
Bar of jurisdiction in certain cases.
36. Deputy Commissioner may enquire into circumstances affecting jurisdiction.
37. Appeal to Commissioner against order under section 36.
38. Extent of jurisdiction.

#### CRIMINAL JUDICATURE.

39. Indian Penal Code to apply to offences committed previous to first January 1862.  
Saving of privileges conferred on certain Chiefs.

#### HONORARY POLICE OFFICERS.

40. Local Government may invest any person with powers of Police Officer.

#### TRACK LAW.

41. Trackers may call for assistance in carrying on tracks.
42. Penalty for withholding assistance or conniving at offence or escape.  
Limit to fine.  
Appeal to Chief Court.  
Fine may be awarded to injured parties, and fee to tracker.

#### SLAUGHTER OF KINE.

43. Control of slaughter of kine and sale of beef  
ARMED MEN AND FOREIGN VAGRANTS.
44. Control of entry into towns of bands of armed men.
45. Powers of Magistrate of district as to foreign vagrants.
46. Surveillance, &c., of band failing to comply with Magistrate's order.

#### MISCELLANEOUS.

47. Regulation of crossing of streams on buoys or skins;
48. of use of pasturage or natural product of Government lands;
49. and of growing, selling, or keeping opium.
50. Local Government to make rules.  
Penalty for breach of rules.  
Existing rules confirmed.
51. Republication of rules and orders.  
Schedule I. Enactments declared to be in force.  
Schedule II. Enactments repealed.



## ACT No. V OF 1872.

(Received the assent of the Governor-General on the 28th March 1872.)

*An Act to remove doubts as to the Jurisdiction of the High Court of Bombay over the Province of Sind.*

WHEREAS it is expedient to remove doubts which have arisen as to the jurisdiction of the High Court of Bombay over the Province of Sind; It is hereby enacted as follows:—

1. The High Court of Bombay has not, and shall be deemed never to have had, jurisdiction over the Province of Sind.

Bar of jurisdiction in Sind of Bombay High Court.

## ACT No. VI OF 1872.

(Received the assent of the Governor-General on the 5th April 1872.)

*An Act to amend the law relating to Oaths and Affirmations.*

WHEREAS it is expedient to amend the law relating to oaths and affirmations; It is enacted as follows:—

Preamble.

Short title.

1. This Act may be called "The Oaths Act, 1872."

2. It extends to British India, applies to all oaths or affirmations taken or made by or administered to British subjects in Native Indian States, and it shall come into force on the passing thereof.

Extent. Commencement.

3. Every person who may by law be sworn or called upon to make a solemn affirmation, in any capacity whatever, may, if he objects to such oath or solemn affirmation, make in place thereof a simple affirmation to the same effect, omitting the words 'So help me God,' 'In the presence of Almighty God,' or other expressions of the same nature.

Persons liable to be sworn may, if they object to oath, make simple affirmation.

4. If any party to, or witness in, any judicial proceeding offers to give evidence on oath in any form common amongst, or held binding by persons of the race or persuasion to which he belongs, and not repugnant to justice or decency, and not purporting to affect any third person, the Court may, if it thinks fit, tender such oath to him.

Powers of Court as to certain oaths when tendered by parties or witnesses.

If any party to any proceeding offers to be bound by any such oath as is mentioned in the first paragraph of this section, if such oath is taken by the other party to, or by any witness in, such proceeding, the Court may, if it thinks fit, ask such party or witness whether he will take the oath or not.

If such party or witness accepts such oath, the Court may proceed to administer it, or if it is of such a nature that it may be more conveniently taken out of Court, the Court may issue a commission to any person to administer it, and authorise such person to take the evidence of the person to be sworn and return it to the Court.

The evidence so given shall, as against the person who offered to be bound by it, be conclusive proof of the matter stated.

If the party or witness refuses to take the oath he shall not be compelled to take it, but the Court shall record, as part of the proceedings, the nature of the oath proposed, the facts that he was asked whether he would take it, and that he refused it, together with any reason which he may assign for his refusal.

5. No omission to take any oath or to make any solemn or simple affirmation, no substitution of any one for any other of them, and no irregularity whatever in the form in which any one of them is administered, shall invalidate any proceeding or render inadmissible any evidence whatever, in or in respect of which, such omission, substitution or irregularity took place.

Proceedings and evidence not invalidated by omission of oath or irregularity.

6. Nothing in this Act shall apply to oaths or affirmations prescribed by any law which under the provisions of the Indian Councils' Act, 1861, the Governor-General in Council has not the power to repeal.

Saving of certain oaths and affirmations.

## ACT No. VII OF 1872.

(Received the assent of the Governor-General  
on the 5th April 1872.)

*An Act to consolidate and amend the Law relating to the Courts in British Burmah.*

WHEREAS it is expedient to consolidate and amend the law relating to the Courts in British Burmah; It is hereby enacted as follows :—

### PART I.

#### CHAPTER I.

##### PRELIMINARY.

Short title.

1872:—

Extent.

Commencement.

It extends to all the territories under the Chief Commissioner of British Burmah; and shall come into force on the passing thereof.

2. All suits, appeals, applications, or proceedings, instituted previous to the passing of this Act in any Court, other than the Courts of the Chief Commissioner and the Recorders of Rangoon and Maulmain, respectively, shall be heard and disposed of by the Courts in which they were instituted.

3. From the date of the passing of this Act the Court of the Chief Commissioner and the Courts of the Recorders of Rangoon and Maulmain, as established by Act XXI of 1863, shall cease to exist.

4. All suits, appeals, applications, or proceedings pending in the Court of the Chief Commissioner, shall be transferred to the Court of the Judicial Commissioner; those pending in the Court of the present Recorder of Rangoon shall be transferred to the Court of the Recorder of Rangoon to be established under this Act; and those pending in the Court of the Recorder of Maulmain shall, if they are of a civil nature, be transferred to the Court of the Judge of the Town

of Maulmain, and if they are of a criminal nature to the Court which has jurisdiction under this Act.

5. The Acts mentioned in the schedule hereto annexed are hereby repealed to the extent mentioned in the third column thereof.

### CHAPTER II.

#### LAW TO BE ADMINISTERED.

6. Where, in any suit of proceeding, it is necessary for any Court under this Act to decide any question regarding succession, inheritance, marriage, or caste, or any religious usage or institution, the Buddhist law in cases where the parties are Buddhist, the Mahomedan law in cases where the parties are Mahomedans, and the Hindoo law in cases where the parties are Hindoos, shall form the rule of decision, except in so far as such law has, by legislative enactment, been altered or abolished, or is opposed to any custom having the force of law in British Burmah.

In cases not provided for by the former part of this section or by any other law for the time being in force, the Court shall act according to justice, equity, and good conscience.

7. Except as provided in section six all questions of fact, law, and equity arising in suits before the Recorder of Rangoon shall be dealt with and determined according to the law administered by the High Court at Fort William in Bengal, in the exercise of its ordinary original civil jurisdiction.

### CHAPTER III.

#### CONSTITUTION AND POWERS OF COURTS.

8. The Courts mentioned in the first column of the subjoined table shall ordinarily have such civil jurisdiction respectively, in the adjudication of suits arising within their local jurisdiction, as is specified in the second column thereof:

I am of opinion that it cannot be received in evidence. I have dismissed the suit, subject, however, to the orders of the Honorable Court as to the correctness of my views."

The Court delivered the following judgments :—

*Scotland, C. J.*—I am of opinion that the endorsement was admissible evidence for the purpose for which it was offered, although not registered.

The parties were not, it appears, at issue as to the discharge of the defendant's mortgage lien. The sole question between them was whether Rs. 263, or the smaller sum really due on the bond, was received by the defendant on the 8th December 1869; and the endorsement, therefore, was put forward simply as confirmatory evidence of the defendant's receipt of the former sum on account of the bond, a fact provable by oral evidence, although stated in the endorsement.

Then, as to there being no signature to the endorsement. That was, clearly, no objection to its reception as confirmatory evidence of the sum received by the defendant. I think the present case may be distinguished from the case of *Achoo Bayamah v. Dhany Ram and another* (IV M. H. C. Rep. 378) on the ground that it is not sought to use the endorsement as evidence of the creation or discharge of an obligation, but merely as confirmatory proof of a fact provable by oral evidence, although stated in writing.

*Innes, J.*—In the case referred to us, the plaintiff had hypothecated certain land to the defendant by a duly registered instrument, and subsequently paid off the debt and received back the instrument. At the time of payment the defendant made an endorsement on the bond to the following effect :—"25th Kartiké of Sukla, Rupees two hundred and sixty-three, principal including interest, was received on account of this bond, and there is, therefore, no lien whatever."

Some time afterwards plaintiff discovered that what he had paid in redemption of the mortgage claim, was in excess of what was due, and he brought a Small Cause Suit to recover the amount overpaid, tendering in evidence the endorsement on the bond. The objection was taken that the endorsement required registration, and, not being registered, was irreceivable in evidence under Section 49 of the Registration Act of 1866.

The District Moonsiff dismissed the suit upon the ground that the endorsement was

not signed by the defendant, and was, therefore, not admissible in evidence, but referred to the High Court the question whether the evidence was rightly excluded.

The ground upon which the District Moonsiff excluded the evidence is clearly untenable, but there remains the question upon which the Chief Justice and Mr. Justice Holloway differ, as to whether Section 49 of the Registration Act precludes the admission of the endorsement as evidence for the purpose for which it is tendered, *viz.*, to prove the amount paid.

In the case at IV M. H. C. Rep. 378, in which I took part, the majority of the Court came to the opinion that an instrument requiring registration by Section 17 of the Registration Act, if unregistered, is by Section 49 inadmissible in evidence for any purpose whatever, and the sole question now open for our consideration seems to me to be whether the endorsement is such an instrument as under Section 17 requires registration. Now, what does the endorsement amount to? Is it in the words of Clause 3, Section 17 "an instrument which acknowledges the receipt or payment of a consideration on account of the creation, declaration, assignment, limitation, or extinction of any such right, title or interest," *i. e.*, of a right, title, or interest in immovable property of a value of one hundred rupees and upwards.

The instrument is, as it seems to me, nothing more than an acknowledgment of the payment of a debt and of the fact of certain legal incidents attaching by the act of payment, which does not operate as a consideration for anything to be done by the person receiving it. No act on the part of the defendant, the person receiving payment, was necessary to replace the plaintiff in possession of the entire interest in the property charged with the debt, for to the act of payment itself the law immediately attaches the incident of extinction of the hypothecation lien.

The clause appears to me to apply to instruments of acknowledgment of payment made on account of some such act of the party receiving payment, as is necessary to effect the change desired in the rights of the respective parties; as an instrument acknowledging repayment of the amount due on a mortgage in which the legal estate having been conveyed a reconveyance has become necessary; or an instrument acknowledging



the payment of a sum of money on account of the extinction of a right of easement in which some act of the party receiving the money is necessary to effect the extinction of the right residing in him. When no act of the party receiving the payment is necessary to effect the change of rights aimed at, the payment, I conceive, does not properly come within the term "consideration." I think, therefore, that the endorsement in the present case does not come within this clause of Section 17. Nor does it seem to come within any other clause of that Section. I am of opinion, therefore, that this case is not governed by the decision in IV M. H. C. Rep. 378, but I am unable to agree in the reasons of his Lordship the Chief Justice for the concurrent conclusion at which I have arrived, that the Registration Act does not shut out the reception of the document in evidence.

### In the High Court of Judicature at Fort William in Bengal.

THE 13TH JULY 1872.

*Present:*

The Hon. F. B. KEMP, } *Two of the Judges*  
 „ F. A. B. GLOVER, } *of the Court.*

CASE NO. 138 OF 1872.

*Special Appeal from a Decision passed by the Officiating Judge of Midnapore, dated 18th September 1871, reversing a decree of the Moonsiff of that District, dated the 4th January 1871.*

Gopeenath Jannah, after his death his widow, Rai Monee Dassee ... } *(Plaintiff's Appellant.*

*versus*

Jeetoo Moolah, after his death his sons, Bipro Prosad Moolah and others ... } *(Defendants' Respondents.*

*For Appellant.*—Baboo Ashootosh Dhur.

*For Respondents.*—Baboos Taruck Nath Dutt and Omesh Chunder Bannerjee.

In a suit for a Kobulyet at an enhanced rent after service of notice, Plaintiff is entitled to a decree for what he can prove to be a fair and legal demand.  
 Full Bench Ruling reported in X W. R., p. 14, distinguished.

Plaintiff sued to obtain a kobulyet at a enhanced rent after service of notice. In

the notice of enhancement as well as in the plaint defendants' jote was described as comprising 24 Beegahs, 3 Cottahs for which plaintiff claimed an enhanced rent of Rs. 113-9-15. The defendant pleaded that his tenure was protected from enhancement, that plaintiff was bound to tender him a pottah which he had not done, and that notice of enhancement was not served upon him. The Court of first instance held that service of notice was proved, that defendants' tenure was liable to enhancement, that the rates of rent at which plaintiff claimed to assess the lands held by defendant were proved to be fair and equitable, but that the quantity of land in defendants' jote was found by measurement to be 22 Beegahs, 6 Cottahs, 13 Chutacks and not 24 Beegahs, 3 Cottahs as was stated in the notice. The Moonsiff accordingly gave plaintiff a decree for kobulyet on account of 22 Beegahs, 6 Cottahs, 13 Chutacks at an annual rental of Rs. 96-14-6. On appeal by the defendants, the Judge dismissed the suit *in toto* on the strength of the Full Bench Ruling reported at page 14 of X Weekly Reporter, and page 280 of XIII Weekly Reporter, holding that as plaintiff failed to prove that he was entitled to a kobulyet exactly upon the terms and conditions specified in his plaint, the Moonsiff ought to have dismissed the suit instead of giving a modified decree upon the proofs adduced in the case. The Judge also held that the notice of enhancement was bad in law.

The plaintiff appealed specially against the above decision upon the following grounds:—

I. That the principle of the Full Bench Ruling quoted above did not apply to this case inasmuch as the ryot, defendant, was previously apprised of plaintiff's demand for enhanced rent by a proper notice under Section 13 of Act X of 1859.

II. That the notice of enhancement was legally sufficient to enable the plaintiff to proceed with the suit in question.

*Baboo Ashootosh Dhur for Appellant.*—

Contended that the Court below was wrong in throwing out his client's suit simply because his client failed to specify in the notice the exact area in defendants' occupation. Moreover, the Full Bench Ruling was applicable only to cases in which suits for kobulyet at enhanced rent are brought without previous notice being given to the ryot as to the extent of the Zemindar's demand.

In the absence of such notice it was but fair that the Zemindar should be compelled to prove his case strictly before he could get a decree. But when a suit for enhancement is brought after service of notice under Section 13 of Act X, the Court ought to proceed to assess the rent which would be fair and equitable under the circumstances of the case. In the next place the notice was properly drawn up, the Court below was wrong in considering it to be illegal.

*Baboo Taruck Nath Dutt for Respondent.*—

The present suit is, in fact, a suit for the enforcement of a specific performance of a contract; plaintiff's claim is inadmissible. He comes to Court upon the allegation that he is entitled to obtain from the defendant the particular kobulyet for which he sues, and which defendant had refused to execute and his suit must stand or fall according as he proves or fails to prove his right to have that particular engagement executed by the defendant. Moreover, the law requires that in every case tender of pottah should precede a demand for a kobulyet, and if the plaintiff failed to tender a pottah such as the defendant was entitled to have, no cause of action could accrue to the plaintiff. Hence in every case for a kobulyet the Court must see whether plaintiff has proved his case exactly as he laid it in his plaint. The previous service or non-service of a notice of enhancement does not affect the question at all.

*Mr. Justice Glover.*—This was a suit for a kobulyet at enhanced rents after notice. The plaintiff claimed to receive Rs. 113-9-5 on area of 24 Beegahs, 3 Cottahs, 1 Gonda. The defendant alleged that he held 19 Beegahs, 5 Cottahs, at a rent of Rs. 57-1-10 which could not be enhanced.

The Moonsiff decided that the defendant held 22 Beegahs, 1 Cottah, 13 Gundas, and that the proper rent payable was Rs. 96-14-6 for which he decreed a kobulyet to run from the ensuing year.

The Judge on appeal held that as the plaintiff had failed to prove his right to a kobulyet at the rate of Rs. 113-9-5, his suit should have been dismissed under this Court's Full Bench precedent *Golam Mahomed vs. Asmut Ali Khan*. (*Weekly Reporter* 14) and that in any case plaintiff ought not to have got a decree for enhancement, as the notice served on the defendant was informal.

The first question we have to decide in special appeal is whether the ruling laid down in *Golam Mahomed vs. Asmut Ali Khan*, and afterwards followed in *Kanchun Deo Sing vs. Tekait Sidh Nath Sing*, XV *Weekly Reporter*, 289, and in *Shib Ram Ghose vs. Pran Pria and others*, XIII *Weekly Reporter*, 280, applies to this case.

After full consideration and not forgetting the very important nature of the question at issue, I am of opinion that it does not. In the cases referred to, the suit for a kobulyet was brought without any previous service of notice of enhancement. In the Full Bench case, express mention is made of this fact, and in the two others there is no allusion to any notice, and it appears to me that there is the widest possible difference between the two classes of cases. It may be and I think it is quite right, that where a landlord without any previous notice sues a tenant for a kobulyet at a certain fixed sum, he should be held to a strict proof of his claim to have a kobulyet at that fixed sum, and that if he fails, his suit should be at once dismissed even though he be able to prove that he is entitled to a kobulyet for some smaller sum, and the reason is that the tenant has been taken unfairly by surprise. His first intimation of his landlord's intention has been a suit for a kobulyet for a rate higher than he has hitherto been paying; he has not been informed of the precise ground on which this demand for a new contract is based, and he has no opportunity, if he wished it, of avoiding litigation except by paying the entire demand. In such a case it is right, that the landlord should be obliged to prove every title of his claim and should have his suit dismissed if he fails.

But when the tenant has had full and timely notice, the case seems to me very different. He knows that his landlord is dissatisfied with the present rate of rent, and thinks he ought to get more, he knows what the grounds of the landlord's claims are, and he knows whether or not he can expect to resist them. The landlord says, the rent you pay is less than you ought to pay, you have more land than you say you have, other ryots of the same class and with similar advantages pay more, the productive power of the land has increased, &c., &c. The rent you ought to pay is so much, and I desire that you enter into a new agreement with me at that rate.

I do not see why in such a case the landlord should not have a decree for what he can prove is a fair and legal demand. In the present case, the difference seems to have mainly arisen in consequence of there being more than one measurement standard relied on, but speaking generally, I do not see why in cases where the ryot has had ample notice and full opportunity of making out his own case, the landlord should lose his, and with it the rights which have been nearly all of them established, merely because his estimate of what the ryot ought to pay, was slightly exaggerated. I think he is entitled to have a kobulyet for what he has proved to be an honest demand.

With regard to the second question, viz the informality of the notice I do not think the Judge is right. The notice contained no doubt all the grounds of enhancement allowed by law, and if it could have been shown, that the ryot had been in any way prejudiced thereby or had been in any difficulty as to what he was called upon to answer, there would have been some reason for disregarding it. But in this case the defendant has contested in the most determined manner every single ground of enhancement. He has objected to the plaintiff's calculation of the area of his holding to the classification of his lands, to the rates of each different kind, and to the allegation that the productive power of the land had increased, and the Moonsiff after taking evidence gave a decision on the merits of each particular objection.

It is clear therefore that the defendant has been in no way prejudiced by the plaintiff's lumping up together all the possible grounds for enhancement in one notice, and that being so I do not think that we should be justified in interfering.

My opinion is, therefore, that the decree of the Judge should be reversed, and that of the Moonsiff restored with costs.

*Mr. Justice Kemp.*—I am of the same opinion.

THE 17TH JULY 1872.

*Present :*

The Hon'ble Sir R. COUCH, Kt. *Chief Justice,*

and

The Hon'ble W. AINSLIE, *One of the Judges of this Court.*

CASE No. 273 OF 1871.

*Regular Appeal from a Decision passed by the Subordinate Judge of Zillah Patna, dated the 12th of September 1871.*

Gooroo Pershad Sahee, one } (*Defendants*),  
of the ... } *Appellant.*

*versus*

Musst. Binda Bibee alias } (*Plaintiff*),  
Nuthu, adoptive mother } *Respondent.*  
and guardian of Ram  
Kishen Panday, ... }

*For Appellant.*—Baboo Sree Nauth Doss and Mohesh Chunder Chowdooree.

*For Respondent.*—Mr. C. Gregory and Moonshiee Mohamed Yussoof.

1. There being two successive attachments on a property, the purchaser deriving his title from the subsequent attachment, takes the property subject to the lien which may have been created prior to such attachment and posterior to the first attachment—the application of the purchase money to the payment of the decree in execution of which the first attachment was made notwithstanding.

2. A mortgagee, causing the mortgaged property to be sold in execution of his decree, although wrongly obtained in respect of his deed of mortgage, cannot follow the property sold in the hands of a purchaser in execution for the enforcement of another lien on the same created subsequent to the first mortgage.

One Azrawul Sing was indebted to Moonshiee Rughoobuns Sahee and Gopynath, who obtained against him a decree for Rs. 600 and odd. The final decree is dated 11th August 1862, execution was taken out, and the disputed property Mouza Mohunpore Pareo was attached on 1st September 1864. It appears that the execution proceedings were struck off on 16th March 1865, on account of the absence of the decree-holder's pleader. On the same day the decree-holder applied for a fresh execution and attachment. The attachment, however, does not appear to have been taken out for some time. In the meantime the judgment-debtors mortgaged a moiety of the said Mouza to plaintiff Mussamut Binda Bibee for Rs. 3,500, and a bond was executed on 13th July 1866, and specially registered under Sections 52 and 53 Act XX. of 1866. Upon this bond, plaintiff obtained a decree on 21st May 1868; execution was taken out, and the whole of the disputed property was attached on 6th February 1869. During the continuance of this attachment, the judgment-debtor Azrawul Sing borrowed a further sum of Rs. 13,000 on 26th May 1868 from the plaintiff on the mortgage of the whole of the property, and the plaintiff, on 30th March 1869, petitioned the Court which was executing her decree, praying that notice of her lien might be given to intend-

ing purchasers. Meanwhile Rughoobuns Sahee and Gopeenath took out a fresh attachment on 5th March 1869, and the property was sold at the instance of plaintiff on 6th May 1869, and purchased by defendant Goroo Pershad Sahee for Rs. 3,725. The sale was confirmed 15th June 1869, and in a proceeding held under Section 270 Act VIII. of 1869, the sale proceeds were ordered to be given to Rughoobuns Sahee and Gopeenath under an order, dated 16th August 1870. Upon this Binda Bibee having foreclosed, sued to recover possession of the property from Goroo Pershad Sahee.

Defendant Goroo Pershad Sahee stated that the mortgage deed under which plaintiff claimed having been executed during the continuance of the attachment of the property covered by it in execution of Gopeenath's decree, in satisfaction of which the property was subsequently sold to him, the plaintiff's title as against him was bad in law; that the plaintiff having herself caused the property in question to be sold in execution of a decree, which she had obtained upon a mortgage bond, was precluded from claiming the same under a mortgage created subsequently.

Upon these pleadings the principal issues framed were—1. Whether the deed of *Bibil-wufa* was executed while the property was under attachment in execution of Moonshee Gopeenath's decree, and if so, is not the said deed legally void?

2. Was the property in suit pledged under a bond of a prior date, and to what extent? Has the plaintiff a preferential right to that of defendant Goroo Pershad Sahee, who purchased in execution of a decree passed on the basis of that bond, and was the decree binding on the property?

The Subordinate Judge found that there was no attachment subsisting when the *Bibil-wufa* was created, and therefore the deed was not legally void.

On the second issue he held that under the provisions of Section 53 of the Registration Act of 1866, the Court had no jurisdiction to pass a decree binding on the property, and therefore that portion of the decretal order, which declared plaintiff's right of executing it upon the property, was a nullity, and that the decree should be considered merely a personal decree; that Goroo Pershad could not take advantage of the lien under the bond of 13th July 1866, and his purchase having been made subsequent

to the plaintiff's *Bibil-wufa* deed, no preferential title has accrued to the defendant. Accordingly he decreed the whole claim of the plaintiff with costs.

In Regular Appeal from this decision, it was contended that the attachment in the case of Gopeenath subsisted till the property was sold, notwithstanding the execution case was struck off the file in the *interim*, and that the plaintiff having obtained his mortgage deed during the continuance of this attachment, her title was bad in law, that the mere circumstance of the sale having been made at the instance of the plaintiff did not shew that the defendant merely obtained the right, title, and interest of the judgment-debtor as in an ordinary sale in execution of a money-decree; that when the purchase-money was applied to the payment of Gopeenath's decree, defendant should be considered as a purchaser in execution of a decree which had been taken out long before the creation of the mortgage in plaintiff's favor, and in support of this contention the following cases were cited:—

Musst. Zohoorun vs. Taylor, X W. R., p. 380, Jhalis Sahoo vs. Ram Churn, XI W. R., p. 519, Anund Lal Das vs. Radhamohun Sha and others, II. B. L. R., F. B., p. 49. Mohesh Narain Sing vs. Kissna Nund Misser and another, Sutherland's Privy Council, p. 488.

It was also contended that the decree obtained by Binda Ribee on the mortgage bond, dated 13th July 1866, declaring her right to sell the property, was not bad in law, and that even if it was bad in law, there could be no defect in the title of the purchaser who had purchased in execution of the said decree, and the plaintiff having herself been a mortgagee to the extent of a moiety, and having caused that moiety to be sold in satisfaction of the said mortgage debt, the defendant's title, as far as that moiety went, was unexceptionable. In support of this proposition, the case of Narain Sahoo and others, defendants, Appellants vs. Uchut Sahee and another, plaintiffs, respondent, XIV W. R., p. 233, was quoted.

On behalf of the respondents, it was argued that the decree obtained by Binda Bibee under the registered bond of 13th July 1866, was of no value, so far as it went to declare plaintiff's right to sell the mortgaged premises in satisfaction of the debt. Sections 52 and 53 of the Registration Act, not giving any such authority, and consequently the decree should be considered

merely a money-decree. The rights of the defendant (purchaser) in satisfaction of the said decree, are not higher than those of an ordinary purchaser in execution of a decree for money. It was also argued that the conduct of the decree-holder shewed that she considered it to be only a money-decree, as she did not proceed against the mortgaged property only, but against other properties. In aid of this contention were cited the case of *Rajkishen Mookerjee vs. Neelmony Mitter*, XI W. R., p. 222, and the case of *Grish Chunder Chowdhry vs. Kisto Soonder Sundal*, XIV W. R., p. 277. It was further argued that Binda Bibee gave notice of her mortgage before the sale, and the sale was made subject to her lien; consequently the purchaser could not plead the invalidity of the said mortgage as against himself.

With regard to the question of attachment it was contended that when the attachment once fell through in consequence of the execution case being struck off the file, and Gopeenath was obliged to take out fresh attachment in May 1869, the mortgage executed in favor of plaintiff in May 1868, could not be said to have been made during the continuance of the attachment, and that even if the attachment was considered to have subsisted throughout the period from 1864 to 1869, still as the sale was made in satisfaction of a decree for money due to plaintiff and not to Gopeenath at whose instance the said attachment had taken place, defendant could not be said to have purchased the property in the execution sale of Gopeenath.

*Sir R. Couch*, Chief Justice (Ainslie J. concurring).—The suit in this case was brought for fore-closure of a mortgage and recovery of possession of sixteen annas of Mouzah Mohunpore Pareo, Pergunnah Shahpore Monair, Zillah Patna, and entry of name in the proprietary and malgoozurce register of the Collectorate, on the ground of a deed of mortgage, dated the 26th of May 1868, and fore-closure proceedings, dated the 27th April 1871.

The case of the defendant was, that, on the 13th of July 1866, a mortgage of eight annas of the Mouzah had been made by Azrawul Sing to the plaintiff Binda Bibee, and that a suit had been brought upon the mortgage instrument under Section 55, Act XX of 1866, and a decree obtained, by which it was ordered that the suit be decreed

to the plaintiff and that the defendants do pay to the plaintiff from their persons and the property pledged to them, the amount of the claim with interest at one per cent. per month on the principal from the date of suit to the date of payment.

Now, it was said that the Court, in a suit under Section 55 of this Act, had not power to order, as was done here, that the money should be paid out of the property which was mortgaged, that the decree could only be for the payment of the money. However, the decree was in this form, and no objection appears to have been made to it. On the 11th of February 1869, an attachment was issued upon it and proceedings were taken to sell the property under the attachment. Now, on the 26th of May 1868, as I have already stated, the mortgage in respect of which the present suit was brought, which was for 13,000 rupees, was made to Binda Bibee, and on the 30th of March 1869 she presented a petition to the Court in consequence of the impending sale of the property in execution of the decree obtained by her under Act XX of 1866. Her petition was this, "Your petitioner prays that when the auction sale is held the fact of Rs. 13,000 being due to your petitioner under the conditional sale, and Rs. 683, 2 annas, and 6 pies on account of the money covered by the decree purchased by your petitioner, and the fact of your petitioner being in possession of the property being under attachment, be notified, so that there may be no difficulty in recovering the money." Upon that an order was made that "the auction sale take place on the objection of the objectors being notified and this case be struck off the file;" and the sale then took place. That appears from a proceeding which is dated the 15th of June 1869 in the Civil Court of Patna, in which it is stated that "on the date fixed the above-mentioned property was put up to sale for the recovery of Rs. 2,012, 7 annas and 8 pies on the conditional sale consideration-money of 13,000 rupees stated in the deed of the 26th of May 1868 in favor of the decree-holder, being notified."

Now, prior to the mortgage of the 8 annas to Binda Bibee, the whole of the property had been attached by decree-holders, named Roghoobans and Gopeenauth on the 10th of September 1864. That attachment was struck off the file on the 16th of March 1865, but was restored on the same day and Roghoobans and Gopeenauth appear to have

taken out a second attachment in March 1869. Then, relying upon the attachment which had been restored to the file in March 1865, they appear to have made an application to the Court with regard to the proceeds of the sale, and an order was made on the 16th of August 1870. The parties to the proceedings in which that order was made were Roghoobuns and Gopeenauth, Bindu Bibee, and Ram Sarren and others, heirs of Chowdhry Azrawul Singh. After stating the proceedings, it was decided that Roghoobuns and Gopeenauth should be first paid out of the proceeds, under Section 270 of the Code of Civil Procedure.

Now the effect of this was that although the sale was made under the attachment in the suit upon the mortgage to Bindu Bibee, and the mortgage for 13,000 rupees was prior to that, and would not be void as against it, yet the application of the proceeds was ordered as if the sale had really been made under the attachment of Roghoobuns and Gopeenauth. The sale should have been under their attachment as against which the mortgage for 13,000 rupees was void, and the sale would not have been subject to it. I doubt whether the proceeding was a proper one, but we have not to determine that. The present defendants' case is this: he says, it is true I purchased under an attachment which was subsequent to the mortgage for 13,000 rupees in respect of which the plaintiff brings this suit, but the money, which was realised from my purchase, was applied in satisfying the decree of Roghoobuns and Gopeenauth, and as their attachment was previous to the mortgage for 13,000 rupees, I claim to have the benefit of it and to have the mortgage held void as against me.

Now I think the defendant is not entitled to that. The decisions of this Court, which have been confirmed by the Judicial Committee of the Privy Council, upon the construction of Section 240 of the Civil Procedure Code, are that "null and void," means not null and void as against every body, but null and void as against the attaching creditors. The decision does not go beyond this, that it shall be null and void as against the attaching creditor and persons who claim under or by virtue of his attachment—persons making title under it. Such a question as the present was not before the Judicial Committee or before this Court in those cases, but the principle upon which they were decided would not entitle the present defen-

dant to have the benefit of an attachment from which he does not derive his title. It is true that the Court has ordered that the proceeds of the sale should be paid to Gopeenauth, but that is a matter subsequent to his purchase. The mere application of the purchase-money does not make him a purchaser under that attachment. Therefore, as regards that part of the case, I think the defendant is wrong.

Then there is another question in the case with regard to the eight annas share which was mortgaged to Bindu Bibee. Now, as I have said, the decree under Act XX of 1866, authorized the sale of the mortgaged property to satisfy the debt, although wrongly, and the property was sold. Therefore Bindu Bibee, the plaintiff, is in the position of a person who has, by the process of a Court, had sold under the mortgage the eight annas share. I think it must be taken that she caused to be sold all which she had power to sell and to give to the purchaser all which she had a title to. This would give to the defendant a priority over the subsequent mortgage for the 13,000 rupees; and it is just and equitable that he should have the benefit of that, and that the present plaintiff should not be allowed, as it were, to set aside her own act in getting the property sold under the mortgage, and set up a subsequent mortgage against the mortgage to her of the eight annas share.

The result is that the defendant is entitled to retain all eight annas share of the property, but that the plaintiff will have a decree as paid for in respect of the other eight annas share, and the parties will bear their own costs in both Courts.

THE 19TH JULY 1872.

*Present:*

The Hon'ble F. B. KEMP, }  
and } .....Judges.  
,, F. A. GLOVER, }

CASE NO. 1276 OF 1871.

*Special Appeal from a Decision passed by the Judge of Zillah Beerbhoom, dated the 31st July 1871, affirming a decree of the Moonsiff of the District, dated the 25th March 1871.*

Pooroosuttum Chunder and others. } (Plffs.) Appellant.

versus

Goursoonder Pandey } (Dfts.) Respondents.  
and others

*For Appellant.*—Baboo Chunder Madhub Ghose and Motee Lall Mookerjee.

*For Respondent.*—Baboo Moheenee Mohun Roy.

A suit brought to recover money paid in execution of a decree to save a property belonging to Plaintiff from sale after his objection under Section 246 Act VIII of 1859 had been disallowed, is in the nature of a suit for damages which is cognizable by a Court of Small Causes, and therefore no special appeal will lie if the amount is under Rs. 500.

The facts of this case will appear from the judgment:—

We think that this Special appeal must be dismissed with costs on the preliminary objection which is made by the vakeel for the Special Respondent. The plaintiffs, it appears, bought a small fraction of an estate from one of the defendants, another of the defendants attached that share in satisfaction of a decree of his own; on which the plaintiff made a claim under Section 246 of the Code of Civil Procedure, and obtained its release. The defendant took out execution again afterwards against the same property and the plaintiff again put in a claim but this time was unsuccessful, and in order to save his property from sale, the plaintiff had to pay the sum due under the decrees, namely, Rs. 359. He now sues to recover these Rs. 359. It is clear, we think, that this is a suit for damages, the plaintiff by that payment, having been undamaged to the extent of Rs. 359 in order to secure from sale the property which he had purchased and this being so, and the value being under Rs. 500, this suit is in the nature of a Small Cause Court suit and no Special Appeal will lie. We have been referred to a case in Vol VII, *Weekly Reporter*, page 383, but that was an entirely different case. In that case it was ruled that a suit for contribution was not in the nature of a Small Cause Court suit, but this is a case of an entirely different nature.

THE 22ND JULY 1872.

*Present:*

The Hon'ble Sir R. COUCH, KT., *Chief Justice*,  
and.

„ „ H. V. BAYLEY, *Judge of this Court.*

CASE No. 143 OF 1871.

*Regular Appeal from a Decision passed by the Subordinate Judge of Zillah Bhaugulpore, dated the 13th April 1871.*

Ahmedee Begum, one of } Appellant,  
the (Defendants) ... }

versus

Debee Pershad and another (Plaintiffs) ... } Respondents.

*For Appellant.*—Moulvie Murhamat Hossein and Mr. C. Gregory.

*For Respondents.*—Baboos Sree Nauth Dass, Mohesh Chunder Chowdhry, and Debendro Nath Bose.

1. A suit for the enforcement of a mortgage lien and for a decree that the money due be realized from the property, is a suit for immovable property, and must be brought in the Court in the Jurisdiction of which the property is situated.

2. The title conferred by a sale in execution of a decree passed by any other Court is a title not under the mortgage, but under the attachment in execution of a simple money decree; such Court not being competent to make a decree declaring the liability of a mortgaged property not situated within its local limits.

One Lutchmun Pershad sued on two bonds, dated 1st April 1860 and 30th December 1862, by which the shares of one Tussudduck Hossein in Mouzas Kossra and Dewla, &c., situated in the district of Bhaugulpore, were mortgaged to him, and obtained a simple money decree in the Patna Court. The decree with a certificate was sent to the Bhaugulpore Court under Section 284, Act VIII of 1859 for execution. The decreeholder attempted to sell the mouzas originally mortgaged to him, but was opposed by the defendants who were in possession of the same under a purchase in execution of another decree against the same judgment-debtor. Their objection was allowed under Section 246, Act VIII of 1859. The plaintiffs, who are the heirs of Lutchmun Pershad, accordingly instituted this suit in the Bhaugulpore Court to recover the amount due to them under the bonds by a declaration of their lien upon the properties originally mortgaged.



Defendant Ahmedee Begum stated that the judgment-debtor's share of Kossra was originally mortgaged to one Lootf Ali under three bonds, dated 10th February 1860, and 15th November 1860, and 21st November 1862. Lootf Ali sued on these bonds in the Patna Court, and obtained a decree with a declaration of his lien on the property mortgaged. In execution of this decree the defendant Ahmedee Begum purchased both Kossra and Dewla, &c. and as Lootf Ali's lien upon Kossra was of a prior date, and it was sold in execution of the decree which Lootf Ali had obtained, plaintiffs could not enforce their lien upon it. Defendant pleaded also that the suit was barred by limitation and that she was a *bond fide* purchaser for a valuable consideration.

The subordinate judge of Bhaugulpore overruled the plea of limitation and decreed the plaintiffs' suit upon the ground, that in respect Kossra, Lootf Ali's heir was lien as declared by the Patna Court of no avail inasmuch as that Court had no jurisdiction to make such a declaration in respect of property situated in the district of Bhaugulpore, while in respect of Dewla it was not even pretended that there existed any prior heir.

In regular appeal it was contended that as the suit was for setting aside the order passed under Section 246 Act. VIII of 1859, it was barred under clause 5 Section 1 of Act XIV of 1859, as it was not brought within one year from the date of that order. On the merits it was argued, that as the sale of Kossra was made by the Bhaugulpore Court; it was a good sale, and could not be set aside, and that the Patna Court had jurisdiction to make the decree it made, in as much as the cause of action (the bonds) rose within the local limits of that Court.

The respondents were not called to answer.

The following judgment was then delivered.

*The Chief Justice, (Bayley, J., concurring)*—This appeal must be dismissed. The decree of the Lower Court is right. I think we must take it that the mortgages under which the plaintiff claims were really executed and were *bond fide* transactions, because supposing that the words in the defendants' written statement "the mortgages created by those bonds are insufficient and unjust," may be read as a denial of the making of the mortgages and as raising a question of the *bond fides* of those transac-

tions, we must see what was done at the settlement of issues.

If the defendant really intended by this portion of the written statement to raise such a question, she might have requested the Lower Court to frame an issue upon it.

The plaintiff would then have had notice of such a question being raised and might have produced evidence upon it and satisfied the Court that the mortgages were *bond fide* transactions.

As no such issue was raised at the first hearing, we must take it that such a case was not put forward by the defendant so as to make it necessary for the plaintiff to give any evidence on the point. It was said by the judicial committee in a suit tried before the Code of Civil Procedure, 9 Moore 301, that they cannot apply to pleadings in judicial courts the strict rule that averments not traversed must be taken to be admitted; but where in a suit tried under that code, issues have been settled, averments upon which no issue is framed should be taken to be admitted, as the Court before proceeding to frame and record the issues is directed to enquire and ascertain upon what questions of law or fact the parties are at issue. If there is any mistake or omission, the Court may, at any time before the decision, amend the issues or frame additional issues. The defendant, therefore, cannot now take the objection, and by his pleader say "the deeds were not executed at all, there is not a tittle of evidence on the record to shew that they were executed." To allow such an objection to be taken now would lead to great injustice. We must take it that the mortgages on which the plaintiff claims are good, and that the question between the parties was that upon which the Subordinate Judge has decided. The case therefore resolves itself into this: The plaintiff has a right as mortgagee. The defendant is a purchaser under a sale in execution of a decree of the Patna Court. It is admitted that the property sold was not within the local limits of the Patna Court. Although that Court might make a decree for the payment of the mortgage debt against the mortgager personally, and might execute that decree by sending it to the Bhaugulpore Court where the mortgaged property was and having it attached, yet it could not make a decree declaring the liability of the mortgaged property. The title conferred by the sale in execution

of the decree was not a title under the mortgage, but under an attachment in execution of a simple money decree. A suit for the enforcement of a mortgage lien and for a decree that the money due be realized from the property, is a suit for immovable property, and must be brought in the Court within the jurisdiction of which the property is situated, namely Bhaugulpore Court. The defendant is not in the position of an assignee of the mortgage to Lootf Ali Khan. If she were, the question would be one of priority of mortgages as between herself and the plaintiff, and if she had a priority it would be only in respect of Rs. 1,000 as regards one of the properties.

As the case stands, the decree of the Sub-Judge is a right decree, and the appeal must be dismissed with costs.

THE 25TH JULY 1872.

Present :

The Hon'ble H. V. BAYLEY, }  
and  
" DWARKA NAUTH } .. Judges.  
MITTER,

CASE No. 249 OF 1871.

*Regular Appeal from a Decision passed by the Subordinate Judge of Mymensing, dated the 31st August 1871.*

Hurrish Chunder Chowdhry, (Dft.) Appellant,

versus

Rajendur Kishore Roy } (Plf.) Respondent.  
Chowdhry

*For Appellant.*—Mr. R. T. Allan and\* Baboo Hem Chunder Banerjee.

*For Respondent.*—Baboos Sree Nauth Dass, Doorga Mohun Dass, and Ishur Chunder Dass.

1. Defendant having agreed to abide by any statements on oath that Plaintiff might make with reference to his claim and the Plaintiff having given his evidence in support of his allegations and the same not being rebutted by the Defendant, the Lower Court was held to have acted rightly in decreeing Plaintiff's claim upon that evidence.

2. A verbal contract between Hindus is neither invalid nor inoperative.

The material facts of this case may be collected from the judgment :—

*Mr. Justice Bayley.*—I am of opinion that this appeal ought to be dismissed with costs :—

The plaintiff, the nephew of the defendant, brings this suit alleging that the defendant took an Izarah lease from him for the term of five years extending from 1274 to 1278 at an annual rent of Rs. 4,812 10 as. ; that there was a balance of rent due from the defendant for three years 1275, 1276, and 1277, amounting to Rs. 14,437 6 annas and less certain payments made by the defendant to the plaintiff, there remained a nett balance of Rs. 14,350 15 annas in plaintiff's favor, and that this with the loss estimated as damages made up Rs. 17,900. Lastly, that notwithstanding repeated demands by the plaintiff from the defendant, the defendant did not pay.

The defendant's case was that he never took any lease from the plaintiff; that the plaintiff was not his lessor nor he the plaintiff's lessee, and therefore this suit for arrears of rent would not lie. Further, that the sum of Rupees 5,639 was due to the defendant from the plaintiff on account that the plaintiff himself realized the rent of the mehal for the year 1274, and that the actual assets made over to defendant by plaintiff on assignment of the lands, were not equal to the amount due to defendant at the time of that assignment.

The first issue was a general one, viz, whether the defendant took a lease from the plaintiff as the plaintiff alleged, or whether there was an assignment of land to meet defendant's due, and still a balance of debt due to the defendant from the plaintiff as the defendant alleged. Also whether the plaintiff held possession of the Izarah mehal during the year 1277.

The Lower Court has based its decision on the fact that as the defendant had, by a petition, dated the 26th August 1871, stated when summoned to give evidence by the plaintiff that in a family dispute of this kind between himself and the plaintiff, it was derogatory to honor to give evidence against each other, and that he was willing to abide by the deposition which the plaintiff might give, he (defendant) was bound by such deposition of plaintiff. It does not very clearly appear from the judgment of the Subordinate Judge as to whether he also considered that the plaintiff had proved his case and the defendant failed to meet it, but it is

clear on the record that the plaintiff gave his own deposition in the fullest and clearest manner; and that the defendant in all his various petitions did not ask the Court to take any evidence on his behalf nor did he put forward anything to rebut the plaintiff's case, so that whether the defendant acted wisely, or otherwise in this respect the case stands thus :—The plaintiff gave his own evidence to prove the allegations made by him in the plaint, and the defendant not only did not tender his own evidence, or that of any witness on his behalf to rebut the plaintiff's statements, but actually undertook by a petition in Court to abide by what statements the plaintiff might make in the case. Therefore it comes to this that in fact and irrespective of the ground taken by the Subordinate Judge, the plaintiff has proved a case which the defendant has in no way rebutted. I do not see, therefore, any just reason in this case for interfering with the result of the judgment came to by the Lower Court.

I may also mention that the defendant took an objection to the effect that the plaintiff's claim is not enforceable as it is based only on a verbal contract. Now the parties were Hindus, and a verbal contract between Hindus is neither invalid or inoperative. No authority is shown to the contrary. The decisions cited now merely rule that contracts in writing should be corroborated by registration, but there is no decision which says that verbal contracts shall not be received in Court.

*Mr. Justice Miller.*—I am of the same opinion. With reference to the first ground I wish to observe that there is nothing whatever in the Registration Act which says that a verbal contract between Hindus is invalid or inoperative. All that the Act says, is, that certain instruments specifically mentioned therein, should not be admitted or acted upon as evidence unless they are registered in the manner provided by the Act. But there is nothing whatever in that Act, or in any of the authoritative rulings either of this Court or of any higher tribunal, on the strength of which it can be held that a verbal contract, like the one on which the present suit is based, is not to be acted upon by a Court of Justice, because there is no registered instrument to support it.

I do not think it necessary to express any opinion as to what would be the effect

of non-registration on the title of a person holding under a verbal contract when that title is impugned by another claiming the same property under a *bona fide* registered instrument subsequently executed in his favor. The present case is between the immediate parties to the contract, and as between them, I do not see any reason in justice or in equity why it should not be enforced if the case set up by the plaintiff is a true one.

The second ground of appeal also must fail. It may be that the Subordinate Judge was wrong in holding as a matter of law that the defendant was absolutely bound by the deposition of the plaintiff inasmuch as he the defendant had, by a previous petition, intimated his willingness to abide by that deposition. But still the evidence, given by the plaintiff, which, if believed, would be quite sufficient to prove his case, must be received as good *prima facie* proof in his favor unless it is rebutted by any counter-evidence on the part of the appellant. Now, there is no such counter-evidence on the record. It has been suggested in the course of the argument that the Subordinate Judge declined to examine the witnesses summoned by the defendant and actually produced by him in Court. But on a close examination of the proceedings of the Subordinate Judge, it appears to me that the defendant did not tender any evidence on his own behalf, and the charge, brought against the Subordinate Judge, viz., that he has improperly refused to examine the defendant's witnesses, must, therefore, fall to the ground. It appears that both parties had cited each other as witnesses. On the 26th August 1871, the Nazir made a report to the Court, that certain witnesses summoned by the defendant were present, but on that very day the defendant filed a petition stating that his position and rank in society would not permit him to appear in Court in order to give his evidence, and asking the Court to dispose of the case *solely* and *exclusively* on the evidence of the plaintiff which evidence he, the defendant, undertook to abide by. The plaintiff's examination was finished on the 28th, and on that very day the Subordinate Judge recorded the following proceeding :—"As the Subordinate Judge of Benares has been requested to take the evidence of the plaintiff's mother by commission, as the above Subordinate Judge has forwarded a robokaree, intimating that

the witness is elsewhere, and that therefore, the taking of the deposition has been postponed for a week, and as the pleader of the defendant being asked, has expressed his intention of informing the Court just at its first sitting on the day following as to the necessity or otherwise of the taking of the evidence of the said witness, it is ordered that the case be postponed this day." It is clear from this proceeding that the Subordinate Judge was quite ready and willing to examine at least the particular witness whose name is mentioned therein, and he actually gave time to the defendant's pleader to mention to him on the following day as to whether his client would like to have the evidence of that witness taken or not. Now what did the defendant do on the next day? Did he ask the Court to take his own evidence or that of any of the witnesses summoned by him including the witness above referred to? Nothing of the kind was done and all that the Court was asked to do was to give further time in order to enable the defendant to explain to his pleader the deposition which had been already given by the plaintiff on the 28th. In the face of these facts it appears to me impossible to hold that the Subordinate Judge has deliberately refused to examine the defendant's witnesses, and the only reasonable conclusion I can arrive at is, that the non-examination of those witnesses is entirely due to the defendants own negligence wilful or otherwise. The reason, why the defendant did not press for the examination of his witnesses, appears to me to be almost self-evident. He himself would not come forward to pledge his oath to the truth of the averments made by him in his written statement, and as he knew very well that the first step which the Subordinate Judge would take in case, he insisted on the examination of the witnesses summoned by him, would be to examine him personally; he thought it prudent to let matters be as they were, and take his stand on the defects which he supposed he could point out in the evidence given by the plaintiff. Some stress has been laid by the learned pleader for the appellant on a letter written by the plaintiff to the defendant on a date long previous to that of the lease, referred to in the plaint. But there is nothing whatever in that letter which is inconsistent with the evidence given by the plaintiff, and as that evidence has not been rebutted by

any counter-evidence produced by the defendant, the case has been, in my opinion, properly decreed against him.

No other grounds of appeal have been urged.

THE 25TH JULY 1872.

Present :

The Hon'ble W. MARKBY, }  
W. AINSLIE, } ... Judges.

In the matter of Sham Churn  
Bhutto, Eshan Chunder Roy,  
and Raj Kristo Roy, ... Petitioners,

versus

L. Payon & Co., of Berhampore, Opposite Party.

For Petitioners.—Baboos Kally Mohun Dass  
and Rash Behary Ghose.

For Respondent.—Baboo Sreenauth Dass.

A Subordinate Judge may review his judgment, Sections 376 and 378, Act VIII of 1859 notwithstanding.

It appears that, from a decision passed by the Moonsiff of Moorshedabad, an appeal was preferred, which was decided by the Subordinate Judge of the district who upheld the decision of the Moonsiff. The Subordinate Judge was subsequently transferred to another district, and the Moonsiff was appointed to officiate as Subordinate Judge of Moorshedabad. A petition of review was afterwards filed against the decision of the Subordinate Judge above referred to, and the petition was transferred to the District Judge's own file inasmuch as it could not be disposed of by the officiating Subordinate Judge whose decision as Moonsiff had been affirmed by the decision against which the petition of review was filed. The learned District Judge held with reference to the provisions of Sections 376 and 386 that, "according to the letter of the law there could be no review of a judgment in reference to a decree passed on appeal by the Subordinate Judge as has been done in this case."

Thereupon an application was made to the High Court for a rule, calling on the opposite party to show cause why the order rejecting the petition of review should not

be set aside, and the petition of review disposed of on its own merits.

It was argued in support of the judgment that the words of Sections 376 and 386 referred to, by the Judge admitted of no doubt and if analogy was to be followed, the practice of admitting special appeals under Section 102, Act VIII B. C. of 1859, from decisions by Subordinate Judges was conclusive on the point.

The following judgment was delivered. *Justice Markby* (Ainslie, J., concurring) :—

This was an appeal from the decision of the Moonsiff to the District Judge, which the District Judge under Section 26 of Act VI of 1871, referred to the Subordinate Judge. The appeal was disposed of by the Subordinate Judge, and subsequently an application for review was filed in the Court of the Subordinate Judge and for the reason assigned, namely, that at that time the Subordinate Judge was the very Moonsiff who had passed the original decision, the District Judge thought it right to transfer the appeal proceedings back again into his Court. Then dealing with them there he supposes that a difficulty arises from the wording of Section 376, Civil Procedure Code, which makes no reference to decrees passed in appeal other than those of the District Court, which by Section 386 is defined to be the Principal Civil Court of Original Jurisdiction in a district, that is, the Judge's Court, and on that ground he held that "according to the letter of the law, there could be no review of a judgment in reference to a decree passed on appeal by the Subordinate Judge as has been done in this case." But we think that this is too narrow a view of the section. A District Judge has power to refer cases to the Subordinate Judge who is to "hear and dispose of them accordingly," that is as District Judge; and therefore by implication the Subordinate Judge has the same power of reviewing his judgment as a District Judge has, and until this decision, we never heard any doubt expressed upon the matter.

The case to which the judge refers is quite a different case. Act VIII of 1869 B. C. provides in what cases an appeal will lie from the order of the District Judge. In the case referred to by the Judge (8 Bengal L. R., p. 187) there was an objection taken by the Respondent that no appeal would lie, because the sums claimed being under Rs. 100, and no question of title being deter-

mined by the judgment by Section 102 of Act VIII of 1869 B. C., the decision of the Court below was final. It was held, however, that the restriction did not extend to a case tried by a Subordinate Judge and which had been referred to him by the District Judge.

It is pointed out that there are clear reasons for inferring that the Legislature did not intend to take away the appeal except in the particular case of a suit tried by the District Judge himself.

We think the best mode of disposing of this case will be to order that if the Subordinate Judge of Moorshedabad is still the Moonsiff who originally tried the case; the Judge should hear the review himself, but, if not, then the District Judge may, if he thinks proper, send it back to the Subordinate Judge. The costs are fixed at two Gold Mohurs, and will abide the final result.

*Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Gourmonee Dassee v. Jogutindronarian Chowdhry and others, from the High Court of Judicature at Fort William in Bengal; delivered 6th July 1872.*

*Present:*

Sir Barnes Peacock,  
Sir Montague E. Smith,  
Sir Robert P. Collier.

Sir Lawrence Peel.

An order of a Court transmitting a decree of its own to another Court for execution must be presumed to remain in force notwithstanding the striking off of the proceedings in execution unless some clear proof is given to the contrary.

*Query.* What does the striking a case off the file amount to?

In this case the sole question was whether an execution of a judgment taken out in January 1862 was or was not barred by the statutes of limitations applicable to India. Those limitations depend, in the first place, upon the third Bengal regulation of 1793, section 14, whereby "The Zillah and City Courts are prohibited hearing, trying, or determining the merits of any suit what-

"ever, against any person or persons, if the cause of action shall have arisen 12 years before any suit shall have been commenced," which regulation has by subsequent constructions been applied to decrees. The construction of April 1802 is to the effect that, "a decree not carried into execution at the time of its being passed, or within a year from that time, may be executed on application being made for that purpose within 12 years from its date, after the opposite party has been called upon to show cause," and so on. "12 years from its date" has been further construed to mean 12 years from the date of the last application made to a proper Court to enforce it. Again, by construction 136 of the 28th October 1813, it was laid down by analogy to the 12 years rule of limitation that, "If the application be not made within 12 years it cannot be entertained unless the Applicant satisfies the Court that there has been good and sufficient cause for the delay."

By a statute passed in the year 1859, number 14, it was enacted that, "No process of execution shall issue from any Court not established by Royal Charter to enforce any judgment, decree, or order of such Court, unless some proceeding shall have been taken to enforce such judgment, decree, or order, or to keep the same in force within three years next preceding the application for such execution."

Section 21 is:—"Nothing in the preceding section shall apply to any judgment, decree or order in force at the time of the passing of this Act, but process of execution may be issued either within the time now limited by law for issuing process of execution thereon, or within three years next after the passing of this Act, which ever shall first expire." The application in January 1862 was within three years of the passing of the Act, and the only question is whether it was within 12 years of the application to a Court having jurisdiction to enforce the decree.

The facts material to the decision of this case may be very shortly stated. The decree in the original suit was obtained on the 26th June 1837, in the Court of the Judge of Zillah Rungpore. On the 10th November 1838 this decree was referred by the Judge of Rungpore to the Principal Sudder Ameen of Zillah Rungpore, to be executed in pursuance of Act 5 of 1836, which is in these

terms:—"It is hereby enacted that it shall be competent to the Zillah and City Judges, within the presidency of Fort William in Bengal, to refer to the Principal Sudder Ameen subordinate to them, applications for the enforcement of decrees, to be executed by the said Principal Sudder Ameen, under the rules prescribed in the general regulations applicable to such cases."

It appears that an order was made in pursuance of this section directing the Principal Sudder Ameen to execute this decree. The order is not before their Lordships; but it must be assumed, in the absence of any impeachment of it on the part of the Appellants, to have been regularly and properly made upon the proper petition and proper application, whatever that may have been, to the Judge of the Zillah Court.

It appears that various applications have been made to the Principal Sudder Ameen in pursuance of this order for execution of this decree. One appears to have been made in 1839, another appears to have been made in 1849, one in 1853, and another in 1861, and possibly, there may have been others. Their Lordships infer, though it is not very clearly stated, that some of these executions have been partially successful in levying the goods of the defendants, but to what extent does not very distinctly appear.

It would seem that the Principal Sudder Ameen has, as it is called, struck this case off his file on several occasions. He struck the case off the file in the year 1839, after the application for execution at that time; and it appears from the copy of his order on the 2nd June 1864 that he struck it off on several occasions, for he says it was "executed and struck off" consecutively on the 2nd June 1849, 7th January 1853, 2nd May 1861, 2nd January 1862, and so on. As far as their Lordships are able to infer, in the absence of any information on this subject, which the Appellants were bound to furnish if they relied upon it, the Principal Sudder Ameen appears from time to time when an application has been made for execution of this decree and that execution has been issued and whatever was leviable has been levied, to have struck the case off the list of the current business before him, and on a fresh application being made for execution to have restored it.



The contention of the Appellants, and their sole contention is this, that when he first struck off this proceeding from his file (as it is called) in 1839, thereupon his jurisdiction to deal with the decree altogether ceased, and that he could not deal with it again until a subsequent order had been made by the Judge of the Zillah Court, sending it back to him again. On that ground they say that these applications were made to a Court altogether without jurisdiction.

The appellants have not shown what this striking off the file amounts to. They have not shown the grounds on which the case was struck off the file, whether for non-prosecution, whether for some default on the part of the decree-holders, whether from in-adventure, or whether from the business of the Court being so conducted that causes which are not immediately before it are not kept upon the paper. Without affording any information on these subjects they have called upon their Lordships to infer that by the proceeding of the Principal Sudder Ameen in 1839, striking off the case from the file, without any explanation of the meaning of this proceeding of the cause of it, the order of the Court referring the decree to the Principal Sudder Ameen for execution was got rid of.

The order having been in force it is for the appellants to satisfy their Lordships that for some good reason it has ceased to be so. Their Lordships are not disposed to infer that a valid order has ceased to be valid, or that a Court of competent jurisdiction having jurisdiction over this subject-matter has ceased to have it unless some clear proof is given of those propositions.

In the absence of such proof, their Lordships have come to the conclusion that the applications to the Principal Sudder Ameen, including that of 1862, were to a Court of competent jurisdiction, and, therefore, that the execution was valid.

Taking this view it becomes unnecessary to determine another question which was raised, viz, whether assuming the Principal Sudder Ameen not to have jurisdiction in 1862, that jurisdiction could be conferred on him by the retrospective effect of an order made by the Judge in 1864.

For these reasons their Lordships will humbly advise Her Majesty that the judgment of the High Court be affirmed, and that this Appeal be dismissed with costs.

### *Judgment of the Lords of the Jud*

*mittee of the Privy Council on the Appeals of Juttendromohun Tagor and another v. Ganendromohun Tagore, and Cross-appeal, from the High Court of Judicature at Calcutta; delivered 5th July, 1872.*

#### *Present:*

Sir James W. Colvile.

Lord Justice James.

Lord Justice Mellish.

Mr. Justice Willes.

Sir Montague Smith.

Sir Robert P. Collier.

#### *SIR LAWRENCE PEEL.*

1. The power of parting with property once acquired, so as to confer the same property upon another must take effect either by inheritance or transfer, each according to law.

2. That a private individual, who attempts by gift or will to make property inheritable otherwise than the law directs, assumes to legislate, and that the gift must fail, and the inheritance take place as the law directs.

3. In construing deeds of transfer a benignant construction is to be used, and that if the real meaning of the document can be reasonably ascertained from the language used, though that language be ungrammatical or untechnical or mistaken as to name and description, or in any other manner incorrect, provided it sufficiently indicates what was meant, that meaning shall be enforced to the extent and in the form which the law allows.

4. All estates created by gift or will, so far as they are inconsistent with the general law of inheritance, are void as such, and that by Hindu law no person can succeed thereunder as heir to the estates described in the terms which in English law would designate estates tail.

5. That a person capable of inheriting under a Will must be such a person as could take a gift *inter vivos*, and therefore must either in fact or in contemplation of law, be in existence at the death of the testator.

6. A trust estate may be created under the Hindu Law, so far as it may be consistent with its provisions.

THESE were consolidated cross-appeals from a decree of the High Court of Judicature in Bengal (Appellate side), disposing of numerous questions touching the right of succession to valuable property, partly ancestral and partly acquired, of the late Honorable Prosonocoomar Tagore, a Hindoo inhabitant of Calcutta, who died on the 30th of August, 1868, leaving his only son, the plaintiff and two widow daughters, with six grandchildren, the children of daughters him surviving.

The defendants are three of the trustees and executors under the will of Prosonocoomar, dated the 10th of October, 1862, together with the persons in existence who claim a beneficial interest under the will, other than legacies and annuities (which



are not disputed). The trustees and executors are Opendromohun Tagore, Juttendromohun Tagore and Doorgapersaud Mookerjee.

Juttendromohun Tagore is named as the first tenant for life, and he had, and has, no son.

The defendant Sourendromohun Tagore (named in the will Shooshendromohun Tagore) is also named as tenant for life.

The defendant Promodecoomar Tagore (a minor), is the son of Sourendromohun Tagore, and was born in the lifetime of the testator. He is described as tenant for life.

The remaining defendant, Suteendurmohun Tagore, (a minor), is the grandson of Lullitmohun Tagore, who was dead at the date of the will. He was born in the lifetime of the testator. His father and grandfather died before the testator. If the will be valid he is entitled to an estate in tail male.

It does not appear that any other person beneficially interested is in existence. The fourth trustee has not acted, though he does not appear to have renounced. No question as to parties has been raised except as to the alleged want of any description of the capacity in which Juttendromohun Tagore has been sued. This latter point was not argued before their Lordships, and they see no reason for doubting that the High Court rightly overruled it.

The will provided for the testator's daughters and grandchildren, but made no provision for the plaintiff, stating that he had been already provided for in the testator's lifetime. That provision was made by nuptial gift on the occasion of the plaintiff's marriage in the year 1843, when there was settled upon him absolutely, by his father, a zemindary, which then fetched Rs. 7,000 per annum, and the present value of which the plaintiff does not state. Upon the death of the plaintiff's first wife, his father also paid him the value of her jewels, to which he laid claim.

The explanation of the exclusion of the Plaintiff from any further provision by this will is supplied by the fact that he had become a Christian in the year 1851. No proceedings of exclusion or degradation had, however, followed or been attempted. Nor does any such question arise as was discussed in *Abraham v. Abraham* (9 Moore P. C. 185), as to the law applicable to the convert's own property or as to the perso-

nal relations of him and his family. The Act XXI of 1850 appears to their Lordships to be conclusive to show that this change of religion does not affect the plaintiff's right of inheritance or suit.

As the present litigation turns upon the validity of the will, it will be convenient to state its effect, citing in terms those parts of it which call for interpretation. It was in the English language.

After reciting that the testator had acquired in severalty large estates, both real and personal, partly ancestral, but for the most part by his personal industry, and that the testator had already made such provision for his son Ganendromohun Tagore (the plaintiff) as he considered sufficient, and that Ganendromohun Tagore would "take nothing whatever under the will," it purports to give all the testator's property to four trustees, of whom Juttendromohun Tagore was one, "their heirs, executors, administrators, representatives, and assigns," upon trust,

As to the personality (except jewels, &c, in the personal use of members of his family, and such jewels, &c., as "the person or persons for the time being beneficially interested in the real estate or the income, or surplus income thereof, shall wish to retain for his and their own use,") to pay funeral expenses, debt, and ordinary legacies within a year after his death, and to sell and to convert the rest into money and securities, and invest the proceeds in the name of the trustees, with power to change the securities,

To pay annuities afterwards given (except 1,000 rupees a-month afterwards given for worship) and legacies payable after the investment, and :

"After payment of such annuities and legacies do and shall pay the surplus unexpended of the said interest, dividends, and annual proceeds unto the person or persons who for the time being shall, under the limitations and directions hereinafter contained and expressed, be entitled to the beneficial enjoyment of my real property, or of the rents and profits or surplus rents and profits thereof; and so soon as all of the said annuities and legacies shall have fallen in and been fully paid and satisfied, do and shall stand possessed of and interested in the said trust, monies, and securities, and the interest, dividends, and annual proceeds thereof, in trust absolutely for the person or persons entitled under the limitations and directions hereinafter contained and expressed, to the beneficial or absolute enjoyment of my said real property."

And as to "realty or immovable property," or of the nature of realty, "to apply the profits in aid of the income of the personalty in payment of debts, legacies, and annuities:"

To pay 1,000 rupees a month for the worship of idols:

And the residue "to the person or persons" for the time being entitled to the beneficial enjoyment of the real estate under the subsequent directions of the will "for the absolute use of such person or persons respectively," and the will desires that the "trustees or trustee shall hold the said real estate generally for the use and benefit of such last-mentioned person or persons for the time being, so far as is consistent with the trusts and provisions" of the will; that, after payment of expenses of management, the person or persons for the time being entitled to the beneficial enjoyment of the real property, or of the income or surplus thereof, should receive 2,500 rupees a month, and that the legacies and annuities should be paid gradually out of the balance, with interest at 5 per cent. The will then directs as follows:—

"And so soon as all the legacies and annuities (save and except the said sum of 1,000 rupees, for the worship of the said idols), given by this my will, shall have fallen in or been paid and fully satisfied, then in trust forthwith, to convey the said real estate and premises unto and to the use of the person who shall, under the limitations and directions herein contained, be entitled to the beneficial interest therein, with and subject to such and the like limitations, provisions, and directions as are hereinafter contained and expressed, of and concerning the said real estate, so far as the then condition of circumstances will permit, and so far (but so far only) as such limitations or directions can be introduced into any deed of conveyance or settlement without infringing upon or violating any law against perpetuities which may then be in force, and apply to the said real estate or the conveyance or settlement of it as last aforesaid (if any such law there shall be)."

All the gifts, &c., in the will are declared to be subject to the bequest to the trustees, and to the provisions and declarations with reference thereto.

The will, then, after reciting that the testator's father had established certain idols at Molla Johur, and had given a talook to supply the means for their worship, and that such provision was insufficient, gives the 1,000 rupees before mentioned per month, for the purposes of the worship.

Provisions follow for the members of his family, other than the plaintiff, by annuities and legacies, to vest upon the testator's death. Then follow provisions for servants, for charities, and for founding the Tagore Law Professorship.

The will then disposes of the real property as follows:—

"And whereas I am, amongst other property, possessed of and entitled to a zemindary or talook called Pergunnah Patleadah and Kismut Patleadah, in Zillah Rungpore, subject to an annual consolidated jumma, payable to Government of rupees 40,555-13-3, and I am also possessed of and entitled to other estates and property in Zillah Rungpore and other districts, and also to a ghaut, which I have erected and built on the river bank side of the Strand Road in Calcutta, and also to land and buildings opposite thereto, abutting on and near to the said road, and also to the Boitakhanah House, land and premises, where I usually reside, and also to various other parcels of real estate. And whereas the frequent division and sub-division of estates in Bengal is injurious alike to the families of zemindars and to the ryots, who are in consequence oppressed by numerous and needy landlords having conflicting interests, when arise dispute and litigations. And whereas I have bestowed much time and money on the improvement of my estates and of the condition of the ryots and tenants thereof, and I am desirous that such improvements should continue to go on, and should not be interrupted by any division of the said estates or disputes concerning the same: Now, therefore, I give and devise (subject always to the devise to the said Ramanauth Tagore, Woopendromohun Tagore, Juttendromohun Tagore, and Door-gapersaud Mookerjee hereinbefore contained) all the real property of what particular tenure, nature or kind soever, and also library, horses, carriages, farmyard, furniture of the Boituckhanah, jewels, gold and silver plates, &c., which I shall, at the time of my death, be possessed of or entitled to, to and for the following uses, and subject to the following provisions and declarations, that is to say:—Unto and to the use of the said Juttendromohun Tagore for and during the term of his natural life; and from and after the determination of that estate, to the use of the eldest son of the said Juttendromohun Tagore, who shall be born during my life for the life of such eldest son; and after the determination of that estate, to the use of the first and other sons successively of the said eldest son of said Juttendromohun Tagore, according to their respective seniorities, and the heirs male of their respective bodies issuing successively; and upon the failure or determination of that estate, to the use of the second and other sons of the said Juttendromohun Tagore, who shall be born during my life successively, according to their respective seniorities, for the life of each such sons respectively, and upon the failure or determination of that estate, to the use of the first and other sons successively of such second or other sons of the said Juttendromohun Tagore and the heirs male of their respective bodies issuing, so that the elder of the sons of the said Juttendromohun Tagore born in my lifetime, and his first and other sons successively, and the heirs male of their respective bodies issuing, may

be preferred to and taken before the younger of the sons of the said Juttendromohun Tagore born in my lifetime, and his and their respective first and other sons successively, and the heirs male of their respective bodies issuing; and after the failure or determination of the uses and estates hereinbefore limited, to the use of each of the sons of the said Juttendromohun Tagore, who shall be born after my death successively according to their respective seniorities, and the heirs male of their respective bodies issuing, so that the elder of such sons and the heirs male of his body may be preferred to and taken before the younger of such sons and the heirs male of their and his respective bodies issuing; and after the failure or determination of the uses and estates hereinbefore limited, then to the use of Sooshondromohun Tagore, the second son of my brother, Hurrucomar Tagore, for the term of his natural life; and after the failure or determination of that estate,—”

Then to the sons of Sourendromohun Tagore and their sons and the heirs male of their body respectively, in like manner as for Juttendro's, and after the failure or determination of the said several estates and uses, to the first and other sons, and their sons, and the heirs male of their body of Lullitmohun Tagore successively, and respectively in like manner as in the case of the sons of Juttendro and Sourendro. Like limitations as to other persons as to which no further question arises.

Then follows a provision that adopted sons shall be deemed sons of the body within the will, but be postponed to actual issue of the body.

The will then contains a special provision for preserving strictly the character of the estates of inheritance which it proposes to create as follows:—

“And I declare that in the construction of this my will, sons by adoption shall always be deemed younger than and be postponed to sons who are the issue of the body of their father, and that the elder line shall always be preferred to the younger, and that every elder son of each heir in succession by descent, and, failing descent, by adoption, and his issue or heir males by descent, and, failing descent, by adoption, shall be preferred to every younger son and his or heir male by descent or adoption, to the exclusion of females and their descendants, and to the exclusion of all rights and claims for provision or maintenance of any person, male or female, out of the estate.”

It next provides that such estates of inheritance shall not be alienable as follows:—

“And I declare my will and intention to be to settle and dispose of my estate in manner aforesaid as fully and completely as a Hindu born resident in Bengal may give or control the inheritance of his estate, or a Hindu purchaser may regulate the conveyance or descent of property purchased or acquired

by him, and not subject to any law or custom of England whereby an entail may be barred, affected, or destroyed.”

Then follows a proviso for cesser and limitation over of the estates, whether for life or inheritance, in case of any part of them being permitted by any holder “to be sold for arrears of Government revenues, or in case of failure to keep up in a due state of repair, and to use as his residence in Calcutta,” the testator's house and furniture, &c., in which case the person next in succession is to take as in case of death.

There follows a power to improve and to make leases for twenty years without fine, and with power of re-entry.

The remainder of the will consists in directions to the trustees as to management and a power of appointment of new trustees in case of death, refusal, or incapacity; and it appoints the trustees to be executors, and gives certain powers to “the acting executors or executor.”

There are two codicils. The first makes further provision for the children of a daughter. It speaks of the testator's “trustees or trustee.” The second revokes that portion of the will which relates to worship and charity, which it states to have been otherwise provided for by the testator.

The Plaintiff, after stating these facts, alleges that the trustees and executors have, against the directions in the will, improperly sold or disposed of a portion of the corpus of the personal estate, consisting of Company's paper, and that there is danger of future waste.

The Plaintiff prays in substance that it be declared:—

1. That the Plaintiff, as only son and heir-at-law, is entitled to represent the estate.
2. That the testator had no absolute power of disposition, especially of ancestral estate.
3. That the trusts as to the residue, after payment of the testamentary expenses, legacies, and annuities are void, or at least void save so far as they give Juttendromohun Tagore a life interest, and that plaintiff is entitled after Juttendromohun Tagore's death.
4. That the plaintiff is entitled to an account of the property, and a declaration of the rights of the parties and incidental relief by receiver, injunction, and otherwise

THE 24TH JULY 1872.

*Present :*

The Hon'ble F. B. KEMP, } ...Judges.  
 ,, F. A. GLOVER, }

CASE No. 120 OF 1872.

In the matter of Ramrunginee  
 Dassee (1st Party) ... *Petitioner,*  
*versus*

Gooroodass Roy, (2nd Party) *Opposite party.*

Mr. Woodroffe and Baboo Sham  
 Loll Mitter for ( 1st Party) *Petitioner.*

Mr. Lowe and Baboo Gerja  
 Sunkur Mujoomdar for (2nd  
 Party) .. .. *Opposite party.*

Cases involving a question of right to collect a proportion of the rents do not come within the purview of Section 318 Code of Criminal Procedure, but must be dealt with under Circular Order No. 10, dated 16th April 1863, and Section 26, Reg. V of 1812, as amended by Reg. V of 1827.

The subject matter of this dispute is a Mouza Pona appertaining to Turuf Roopapat ; Doorgadass, the husband of the 1st party, Ramrunginee, and the 2nd party, Gooroodass, were brothers and they were the owners of the property Roopapat. On the death of Doorgadass his widow, the 1st party, and Gooroodass lived in commensality and granted a putnee of this property together with other Zemindaries to one Chundi Churn Mitter, son-in-law of the 2nd party. The putneedar was in possession down to 1277 B. S., when he put in an istafa in favor of Ramrunginee and Gooroodass. Thereupon Ramrunginee began to collect from the ryots an 8 annas share of the rent which she alleged to be her share ; Gooroodass resisted on the ground that Ramrunginee by an ikrar had relinquished the share of her husband in favor of himself Gooroodass, in consideration of a monthly allowance of Rs. 200 in the shape of a maintenance. In consequence of this a breach of the peace being apprehended, the Magistrate of Furreedpore instituted proceedings upon the report of the Police under Section 318 of the Code of Criminal Procedure, and called upon the parties to file written statements of their respective claims. On the appointed day the 1st party did not appear but sent, in a telegram, to the Magistrate that time may be granted to her to enable her to file her written statement inasmuch as she had not received notice in sufficient time. The

Magistrate, without granting her further time and after examining some of the witnesses of the 2nd party, declared that the 2nd party be retained in possession till ousted in due course of law.

The 1st party moved the High Court under Section 404 of the Criminal Procedure Code with reference to the Magistrate's order, complaining that no personal service of notice had been made. The High Court quashed the proceedings of the Magistrate, holding that service of notice in the Mofussil was not sufficient and that personal service was necessary. The case was sent back with the remarks that if Ramrunginee, as she alleged, was a coparcener in the property, Section 318 would not apply, but that the case must be dealt with as directed in the Circular Order No. 10 of the High Court of 16th April 1863. The magistrate on receipt of this order,\* made over the case to Baboo Bhoobun Mohun Raha, Deputy Magistrate, who on the 17th April 1872, found that the dispute came within the provision of Section 318 of the Criminal Procedure Code, and on the evidence found that the 2nd party, Gooroodass, was in possession, and accordingly directed that he be maintained in possession.

Ramrunginee again came before the High Court under Section 404, and a rule was issued on the 2nd party to show cause why the order of the Deputy Magistrate should not be reversed.

Mr. Woodroffe contended, in support of the rule that Section 318 did not apply to the present case inasmuch it did not refer to any dispute about land, but that it related only to a right to collect a certain proportion of the rents, that Section 26 Reg. V of 1812 as modified by Reg. V of 1827 applied. Mr. Lowe argued, *per contra*, upon the authority of Mr. Justice Glover's judgment reported in V. W. R., Criminal Rulings, p. 14, that Section 318 applied to the case.

The judgment was delivered by Justice Kemp (Glover, J., concurring).

This case was before the Court on the 13th of January 1872, on that occasion we observed that the 1st party Ramrunginee Dassee, being as she alleges a joint-sharer in the property in dispute, had attempted to exercise her right to collect the rent in a certain proportion in the undivided estate, and that if such was the case, the matter

\*XIX W. R., p. 33, Criminal Rulings.

could not come under the provisions of Section 318 of the Code of Criminal Procedure, but must be dealt with as directed in the Circular Order\* of this Court No. 10, dated 16th April 1863. We further directed the Magistrate in retrying the case to give the parties an opportunity of appearing before him. The Magistrate, on receipt of our remand order, thought proper to make over the case to the Deputy Magistrate, Baboo Bhooobun Mohun Raha, who has found that the dispute comes within the purview of Section 318 of the Code of Criminal Procedure, and on the evidence, that the 2nd party, Baboo Gooroodass Roy, is in possession. The order of the Deputy Magistrate, directing that the 2nd party be kept in possession until ousted in due course of law, is dated the 17th April 1872.

On the 26th June on the petition of the 1st Party, Ramrunginee Dasse, we directed a rule to issue on the 2nd party to show cause why the order of the Deputy Magistrate should not be reversed.

The case has been fully argued before us by Mr. Lowe for the 2nd party in support of the Deputy Magistrate's judgment, and by Mr. Woodroffe for the first party in support of the rule. The position of the parties is this: Gooroodass Roy, the 2nd party, and Doorgadass Roy, the husband of Ramrunginee, the first party, were uterine brothers. Doorgadass died in 1838. After his death, his widow, Ramrunginee set up a will and a power to adopt, disputes arose, and two suits were instituted in the late Supreme Court on the part of the widow; one to establish the will and her power of adoption, the other for her share in the joint undivided estate. These suits were eventually compromised and a decree was passed according to the terms of that compromise, the result being that it was declared that Ramrunginee was entitled to a one-fourth share of the joint undivided estate, and her power to adopt was recognised. This decree was passed in February 1846.

It is alleged by Gooroodass Roy that the compromise upon which the decree of February 1846 is based, contemplated the execution of a further deed between the parties according to the terms of which Gooroodass was to manage the collections from the share of his sister-in-law, Ramrunginee, that

in pursuance of this, an *ekrarnamah* or power of attorney was executed by Ramrunginee on the 18th Assar 1253, June 1846, according to the terms of which Ramrunginee made over her whole title to a share of the joint undivided estate to him for the consideration of an allowance by way of maintenance of 200 rupees per mensem for the term of her life. It is under this deed that Gooroodass claims to be in exclusive possession of the whole estate with the right to collect 16 annas of the rent from the tenantry. The execution of this deed is emphatically denied by Ramrunginee. The Deputy Magistrate observes with reference to this deed that "the genuineness or otherwise of it is a question for the Civil Court to settle." He then proceeds to state that it appears to be true that Ramrunginee did execute "a" power of attorney in favor of Baboo Gooroodass Roy inasmuch as in her deposition under Section 175 of Act VIII of 1859, she said, "perhaps Gooroodass Roy took a power of attorney signed by me," and further that in the same deposition she has stated, "he does not pay me 200 rupees per mensem, 2,000 rupees per annum." We, so far, concur with the Deputy Magistrate, that it will be for the Civil Court to decide the question of whether Ramrunginee did execute the *ekrar* or not. We have looked at it and considered its terms to enable us to ascertain the precise position of the parties and for no other purpose. The deed in question is one of a very peculiar description. The widow is made to give up willingly her right to adopt, to establish which she had brought to a successful conclusion a suit in the Supreme Court; and to accept a monthly salary by way of maintenance, of 200 rupees in lieu of a one-fourth share in a joint undivided estate of very great magnitude and value.

Ramrunginee has, on oath, denied the execution of this deed, Baboo Gooroodass Roy has not deposed to its execution. The deed is not registered, it was originally engrossed on an insufficient stamp, and though executed in 1846, it was not produced in any Court or in any published to the world before 1861, and that too, in an *ex parte* proceeding. Again in 1865, it was successfully repudiated by Ramrunginee when she was permitted to take out execution of a decree jointly in proportion to her share in the undivided estate in spite of this deed.

\* *Vide* XVII W. R. pps. 9 and 33, Criminal Rulings.

If, therefore, this deed be left out of the question, as either of doubtful authenticity or one upon the genuineness of which this Court cannot under the provisions of Section 318, decide, the parties revert to the position which they held under the decree of the late Supreme Court under which Gooroodass Roy is entitled to a three-fourth share and Ramrunglees to a one-fourth share of the joint undivided estate.

When the present dispute arose between the parties and proceedings were instituted under the provisions of Section 318 of the Code of Criminal Procedure, both parties, and more particularly the 2nd party, Gooroodass Roy, repudiated the idea that the section applied. In the kyfeut of Gooroodass Roy, we find a statement to the effect, "that inasmuch as Ramrunglees alleges, that she is in possession of her share, the provisions of Section 318 cannot apply, and it is the Civil Court which can take cognizance of the dispute.

Section 318 of the Code of Criminal Procedure refers to disputes concerning land. In this case there is no dispute concerning land, the dispute is as to the right to collect the rents of a joint undivided estate in a certain proportion. Ramrunglees states, "my right to a one-fourth share in the joint estate has been declared by a competent Court. I claim my right to collect the rents in proportion." Gooroodass admits that the right of Ramrunglees was declared, but asserts that she has divested herself of that right according to the terms of the ekrar. In this state of things if we admit the ekrarnamah or power of attorney to be genuine, of which we entertain grave doubts, the position of Gooroodass Roy is that of an attorney for the lady \* he as member of a joint-family is managing the share of another member of that family, and therefore his possession would not be adverse. Take away that ekrar, the right of the widow of Doorgadass Roy, namely, Ramrunglees to a one-fourth share of the joint undivided estate having been declared, any dispute as to the exercise of that right which, as in this case has taken the form of an attempt on her part to exercise her legal rights by collecting her proportion of the rent, cannot come within the purview of Section 318 of the Code of Criminal Procedure, but must be dealt with as directed in our remand order, under Circular Order No. 10, dated 16th April 1863, and Section 26, Regu-

lation V of 1812 as amended by Regulation V of 1827.

The order of the Deputy Magistrate is reversed.

*The 26th July 1872.*

#### CRIMINAL REVISIONAL JURISDICTION.

*Present :*

The Hon'ble F. B. Kemp and }  
" " F. A. B. Glover } ... *Judges.*

Government of Bengal, *Petitioner,*

*versus*

Surwar Jan, ... *Opposite Party.*

*For Petitioner.*—Mr. Bell, Legal Remembrancer.

*For the Opposite Party.*—Baboo Durga Churn Doss.

*Held*—That a review of judgment from a sentence or judgment of the High Court or a Division Bench of the High Court on appeal, may be granted where such order is passed without notice to the opposite party and where the order is based upon an error in law caused by a misrepresentation of the facts of the case.

Property which was declared to be at the disposal of Government under Section 184 of the Code of Criminal Procedure could only be restored by Order of Government.

The facts are fully stated in the judgment.

*Kemp, J. (Glover, J., concurring.)*—In this case Mr. Bell, the Legal Remembrancer, appeared on behalf of the Government of Bengal, and moved the Court to cancel an order passed on the 27th March 1872 on the *ex parte* petition of one Surwar Jan.

On the 8th July 1872 notice was served to Surwar Jan to appear in person or by pleader.

It appears that Surwar Jan was committed by the Magistrate of Furriddpore to the Sessions to take his trial on a charge of riot with murder. Surwar Jan was convicted by the Sessions Judge, but on appeal was acquitted by this Court.

Previous to the apprehension and commitment of Surwar Jan he had evaded process, viz., a warrant issued against him and certain movable property belonging to him which had been attached, was declared to be at the disposal of the Government under Section 184 of the Code of Criminal Procedure. After the acquittal of Surwar Jan by this Court, he was put on his trial under Section

174 of the Penal Code, and being convicted was sentenced to imprisonment for a term of six months and a fine of Rs. 1,000, this being the maximum sentence which can be passed under that section.

Surwar Jan then petitioned this Court, and on the 22nd December 1871, Justices Kemp and E. Jackson were of opinion "that it could not be said that Surwar Jan's absence did not originate in a desire to evade process," but on the last ground of his petition which contained a prayer for mitigation of punishment, those Judges held that although they confirmed the conviction, they were of opinion that as Surwar Jan had been then some months in jail and had been acquitted of the graver charge of riot with murder, the remaining portion of the sentence ought to be remitted. Nothing was said as to the remission of the fine, but doubtless it was the intention of the judges to remit it.

Subsequently on the 27th March, 1872, Surwar Jan presented a petition to this Court praying that as he had been, as he states, "released by this Court from the unjust sentence passed by the Magistrate," the Court would be pleased to direct the confiscated movable property to be restored to him. On this petition we passed an order directing the Magistrate "to restore all the movable property of the petitioner which may be under attachment."

It is clear that the pleader who presented this petition did not place all the true cir-

cumstances of the case before the Court; no mention of the fact that the property in question had been declared to be at the disposal of the Government was made, the petitioner was also incorrect in stating that this Court "had released him from the unjust sentence passed by the Magistrate." What the Court did was to mitigate the sentence, although they upheld the conviction.

It has been argued by the pleader for Surwar Jan that this Court is not competent to review its order, and a case to be found in Volume V of the Weekly Reporter, Full Bench, Criminal Rulings, was referred to. In that case it is laid down that a review of judgment will not lie from a sentence or judgment pronounced by the High Court or by a division Bench of the High Court on appeal. But in this case our order was passed without notice to the Magistrate or the Government of Bengal, and the facts of the case were to say the least not correctly stated.

Being, therefore, of opinion that the property, which has been declared to be at the disposal of the Government of Bengal, can only be restored to Surwar Jan by that Government, and that our order of the 27th March 1872, which, though it refers in terms to the property under attachment clearly contemplated the property in question, was based upon an error in law caused by a misrepresentation of the facts, we cancel it.



JULY, 1872.

V. H. SCHALCH, Esq.

No. 1.

FROM reports which have been received it appears, that arrears of rents from ryots not holding transferable tenures in Government khas mehals have hitherto been realized either by the enforcement of the old summary procedure under Section 25, Regulation VII of 1799, although that procedure has been repealed by Act VII (B. C.) of 1868, or by applying the certificate procedure of Act VII (B. C.) of 1868, which can be enforced for the recovery of arrears of rent from the holders of transferable tenures only (see definition of "Tenure" in Section I of the Act). District Officers should clearly understand, that arrears due from ryots not holding transferable tenures, must be sued for in the Civil Court, or recovered by process of distraint, either under Act X of 1859, or Act VIII (B. C.) of 1869, whichever may be in force in the district.

No. 2.

For the year 1872-73, and for the future, Commissioners are requested to submit, at the end of each financial year, particulars regarding the education, &c., of male minors in their Divisions in the form prescribed below. The Member in charge particularly requests that *full* information may be given in the last column—

1	2	3	4	5	6	7	8	9
Division.	District.	Name of Ward.	Age of Ward.	Place of Residence.	Religion.	Caste.	Net Collection from the Estate during the past year.	Arrangements made for his Education.

No. 3.

As Return No. XXXVI is not now submitted to the Board, the word "Commissioner" should be substituted for "Board"

in line 5 clause 7 B, Section VI, Chapter VI, page 121, of the Board's Rules.

No. 4.

ALL Local Revenue Officers are hereby cautioned against taking over on behalf of Government under-tenures or farms of persons, whose property has been declared under Section 184 of the Code of Criminal Procedure to be at the disposal of Government, without first satisfying themselves whether the under-tenure or farm is likely to result in a loss to Government. An instance recently occurred in which the Government had not only to pay to the landlord a sum of money considerably in excess of the rents collected, but was also sued by one of the co-sharers in the tenure for a refund of his share of the amount advanced as *zarpeshgi*.

A. MONEY, Esq., C. B.

No. 5.

CASES having occurred in which the income tax establishments, sanctioned under Act XII of 1871, have been retained beyond the period for which they were sanctioned, all officers engaged in carrying out the provisions of Act VIII of 1872 are informed that no retention of the establishments sanctioned under the latter Act, will be allowed, or excess salaries afterwards sanctioned, unless at least a month's previous notice has been given for the Board's approval.

No. 6.

THE immediate attention of District Officers is drawn to paragraph 3 of the rules issued by the Lieutenant-Governor of Bengal for the guidance of all officers engaged in carrying out the provisions of Act VIII of 1872. The month for which notice was to be given, has now expired, or nearly expired, in every district, and the Statement No. 2 there called for, should be at once sent up through the Commissioner. Commissioners should see that no delay is allowed to occur in their office, and that the Statements are forwarded to the Member in charge as soon as they are received by them.



5. An appeal lies from all orders of sirdars, dollois, and other chief village authorities in police matters to the Deputy Commissioner, whose orders are final. But the Commissioner may call for the proceedings and modify or reverse any order should he think fit.

6. The ordinary rules of the Bengal Police shall, as far as they are applicable, be observed by the Regular Police; and all returns in matters of account, and all registers required to be kept by the Bengal Police, as far as they are applicable, shall be made and kept up.

The Commissioner shall exercise the powers of an Inspector-General of Police as defined by section 3, Act VII (B.C.) of 1869: the Deputy Commissioner shall exercise the powers of District Superintendent of Police: the Assistant or Extra Assistant Commissioner the power of Assistant Superintendent of Police.

7. The Regular Police shall only act, when required to do so, by general or special order of the Commissioner, Deputy Commissioner, or other officer duly authorized, who may assign to the force any portion of the duties of police, under Act V of 1861, in any locality.

8. The ordinary duties of police shall be discharged by the sirdars and dollois, and other village authorities duly authorized by the Deputy Commissioner. They shall arrest all criminals, and repress all disorders within their respective jurisdictions.

9. It is the duty of the sirdars, dollois, and other chief village authorities to report to the Deputy Commissioner all crimes, violent deaths, or serious accidents occurring in their districts, and all occurrences, whether within or beyond their jurisdictions, which may come to their knowledge likely to affect the public peace, at the earliest possible moment, and to deliver up offenders as soon as may be to the officer authorized to try them.

10. The sirdars, dollois, and other village authorities shall watch and report, and in very emergent cases may apprehend and deliver up, vagrants or bad and suspicious characters found in their jurisdictions.

11. On the occurrence of any heinous crime\* in his district, any village officer who

may be by custom or appointment charged with the duty of arresting criminals shall at once apprehend the offender, if able, and in any case at once report to the sirdar, or dolloi, or other chief village authority, who, if the offender has not been apprehended, will proceed without delay to the place where the crime occurred, and inquire into the matter. If a crime beyond his cognizance has been committed, he will immediately report it to the Deputy Commissioner or other duly authorised officer, whether the offender has been apprehended or not.

12. Sirdars, dollois, and all other village authorities may pursue with hue and cry, and apprehend an offender fleeing beyond their jurisdiction, and arrest him; but ordinarily no sirdar, dolloi, or village authority shall attempt to arrest an offender beyond his own jurisdiction without the cognizance and co-operation of the sirdar, dolloi, or chief village authority of the village to which the offender has fled. When an offender is traced from one village to another, it will be sufficient to point him out to the sirdar, dolloi, or other competent authority of the village to which the offender has fled, and request him to make the arrest.

13. When the sirdars, dollois, or other chief village authorities feel unable to arrest an offender, they must apply to the Deputy Commissioner, or any officer duly authorized, to grant them the aid of the regular police.

14. The sirdars, dollois, and other chief village authorities are empowered to arrest or cause to be arrested, and may also fine, or drunkards and other disorderly persons found brawling out of their houses, and all persons found gambling; the fine not to exceed that awardable under their powers in criminal matters as hereinafter defined.

15. All the inhabitants of the Khasi and Jynteah Hills are bound to aid the Regular Police and village authorities, when required to do so, in the maintenance of order or the apprehension of offenders. Any person failing to do so is liable to fine; the fine to be adjudged by the sirdar, dolloi, or other chief village authority, to the extent he is empowered to award in criminal cases, or

\* *Heinous crimes.*

Rebellion,  
Riot.

Counterfeiting coin or  
passing counterfeit coin.

Murder.  
Wounding to the in-  
jury of life or limb.  
Rape.  
Theft.  
Robbery.

Dacoity.  
Cattle-stealing.  
Arson.  
House-breaking.  
Forgery.

by the Deputy Commissioner, if fine, beyond the amount the village authorities are authorized to impose, is considered necessary. When the particular persons blameable for failure to aid in any community cannot be ascertained, the sirdar, the dolloi, or chief village authority shall be considered responsible; and if it appears that the community is to blame, and that particular offenders cannot be discovered, a fine may be imposed upon the community but by the Deputy Commissioner only.

### III.—CRIMINAL JUSTICE.

16. Criminal justice shall be ordinarily administered by the Deputy Commissioner, his assistants, and by the sirdars, dollois, and other chief village authorities of the different communities.

17. The Deputy Commissioner shall be competent to pass sentence of death, or imprisonment for a term unlimited, or of fine up to any amount: provided that no sentence of death shall be carried into effect without the concurrence of the Commissioner and sanction of the Lieutenant-Governor, to whom the proceedings shall be submitted by the Commissioner if he concurs in the sentence; and no sentence of imprisonment for a term of seven years or upwards shall be carried into effect without the approval of the Commissioner. The Commissioner may enhance any sentence passed by his subordinates; but no offence shall be punished by a sentence exceeding that awardable under the provisions of the Indian Penal Code. Assistant Commissioners shall exercise such powers as they may be invested with by the Commissioner, not exceeding those of a Magistrate of the first class as defined in Act X of 1872.

18. Any sirdar, dolloi, or other chief village authority may be empowered by the Deputy Commissioner to dispose of cases of persons charged with any of the following offences:—

Injury to property not exceeding Rs. 50.

Injury to person not affecting life or limb.

House-trespass.

They may impose a fine for any offence they are competent to try to the extent of Rs. 50. They may award restitution or compensation to the extent of the injury sustained, and enforce it by distraint of the property of the offender. In cases in which the fine is not paid or realized either in

whole or in part, they shall represent the facts, and send in the offender to the Deputy Commissioner, who may retry the case and impose such other punishment as he is competent to inflict. Each sirdar, dolloi, or other chief village authority, who may be empowered as above, shall receive a sunnud of recognition under the signature of the Deputy Commissioner.

19. Sirdars, dollois, or other duly recognized village authorities may, carry out their decision, or order attachment of property as soon as judgment is pronounced; but in no case is property so attached to be sold, if the party convicted claim to appeal within eight days, without the orders of Deputy Commissioner.

(a.) Sirdars, dollois, or other duly recognized village authorities may not decide in cases where their father, mother, son, daughter, wife, or the children, husbands, or wives, of any of these are concerned; or

(b.) Where the defendant is not a native of the Khasi and Jynteah Hills, or is not resident within their jurisdiction; or

(c.) When the offence is one against the State, or has caused death or danger of life, or amounts to robbery or theft, or concerns counterfeiting of coin or the making of fraudulent documents, or the like.

20. The sirdars, dollois, or other duly recognised village authorities shall not decide any cases save in open durbar in presence of at least three witnesses and the complainant and accused, whose attendance they are empowered to compel. Either party may appeal from the decision at the time decision is pronounced, or within eight days thereof, to the Deputy Commissioner or his assistant in which case the sirdar or dolloi, or other duly recognised authority, shall take the parties, or cause them to be sent, before the Deputy Commissioner or his assistant, with one of the persons required to attend as a court witness. The case shall then be tried *de novo*.

21. An appeal lies from the Assistant Commissioner to the Deputy Commissioner if preferred within sixteen days.

22. No appeal shall lie as a matter of right from the sentence of the Deputy Commissioner involving sentence of less than three years' imprisonment; but it is competent to the Commissioner to call for the record of any case whatever, and to modify or reverse the decision passed. All sentences



# THE LAW OBSERVER.

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## *Tagore Law Lectures, 1872.*

As Tagore law professor, Mr. Herbert Cowell, has been eminently successful. The work before us which is divided into twelve lectures is the result of his third year's labours as such. It is a history of the Legislative Councils and of the judicial institutions which have been established by the British Indian Government, supplemented by an account of the existing Councils and Courts which severally make and administer the laws now in force in the country. Surely the subject is far from inviting, but it is essential to an acquaintance with the government and constitution of the empire. Mr. Cowell, however, has thrown a charm over the work which makes it eminently a pleasant reading. The style is terse, elegant and perspicuous, and fully supports the learned professor's reputation as an Oxford Prize Essayist. The plan of arrangement which he has adopted is also unexceptionable. He divides the history of the subject into two portions. He gives first a general view of the East India Company, its conquests and its attempts at social organization down to 1781, and then traces separately the subsequent history of the legislative and judicial institutions which by that time had sprung into a separate and distinct existence. The year 1781 surely marks an important era in the history under consideration, being the date of the commencement of

independent Indian legislation, of the authority of the Supreme Court, of the establishment of the Board of Revenue, of the recognition by Act of Parliament of the Sudder and Provincial Courts which had already been established, and of the recognition by Act of Parliament and in the Revised Code of Bengal, of the right of Hindus and Mahomedans to be governed by their own laws and usages.

The Portuguese were the first European people that during the middle ages carried on a trade with India. They were, however, superseded by the Dutch, who in their turn made room for the English. In the year 1600 A. D., a charter, granted by Queen Elizabeth, ushered the London East India Company into a corporate existence, with the exclusive right of trade to all parts of Asia, Africa, America and beyond the Cape of Good Hope eastward to the Straits of Magellan. Another body of English merchants was incorporated in 1698 A. D., by an Act of Parliament, under the designation of the English East India Company, and the two Companies were united under the award of Godolphin in the sixth year of the reign of Queen Anne, their rights and privileges being still regulated by the Charter granted by King William III in 1708, by which the Court of Directors was constituted, and the General Court of Proprietors vested with chief authority and control over the affairs of the

Company. This state of things continued till the passing of the Regulating Act of 1773, by which a Governor-General and a Council were first nominated, and a Board of Control was shortly afterwards established in England.

Before the conquest of the country by the English, their position was extremely anomalous. Although they held their factories as subjects owing allegiance to the great Mogul, they made and administered their own law within their local limits; in all cases of dispute that might arise among their English servants and such native settlers as chose to place themselves under their protection.

The earliest traces of this legislative authority are to be found in the Charter of Elizabeth, dated 1601, which empowered the Governor and the Company "to make, ordain and constitute such and so many reasonable laws, ordinances, as to them or the greater part of them shall seem necessary and convenient for the good Government of the said Company and of all factors, masters, mariners and other officers employed or to be employed in any of their voyages, and for the better advancement and continuance of their trade and traffic." They were also authorized to execute such laws "and at their pleasure to revoke and alter the same or any of them, as occasion shall require," and to provide such pains and penalties as might appear to them necessary.

2. The Charter of James I, granted in 1609, renewed the same power. Both Charters contained the proviso—"So always as the said laws, orders, constitutions, ordinances, imprisonments, fines and amercements be reasonable and not contrary or repugnant to the laws, statutes, or customs of this our realm."

The Charter of Charles II, dated 1661, contained a similar proviso. In the Charter relating to the island of Bombay granted by that monarch in 1669, a similar legislative authority was given.

6 All these Charters were surrendered, when the amalgamation of the two Companies took place under the award of Lord Godolphin.

5 By the Charter granted by William III in 1698, the Company were vested with the Government of all their forts, factories and plantations, the sovereign power being reserved for the crown. Courts of justice were established as before, but nothing was said about the legislative power.

6. By the Charter granted by George I in 1726, Mayor's Courts were established and the Governors and the Councils of the three Presidencies were authorized "to make, constitute and ordain bye-laws, rules, and ordinances for the good Government and Regulation of the several corporations hereby created, and of the inhabitants of the several towns, places, and factories aforesaid respectively, and to impose reasonable pains and penalties upon all persons offending against the same or any of the same." Such laws were to be reasonable and in conformity with the laws and statutes of England, and were not to have any force or effect until they had been approved and confirmed by order or meeting of the Court of Directors.

7 The Charter of 1753 ran almost to the same effect.

With regard to the judicial powers of the Company during the period we are speaking of, it appears that so early as 1618, Sir Thomas Roe, the ambassador of James I, had secured by treaty with the Mogul the privilege that all disputes arising among the English in connection with the factory of Surat were to be decided by the English themselves.

By the early English Charters granted to the Company they were empowered, though in a vague and general way, to administer justice to those who should live under them.

2. In 1661 Charles II granted by a royal charter to the Governor and the Council of the several places belonging to the East India Company, the power to "judge all persons belonging to the said Governor and Company, or that should live under them in all causes whether Civil or Criminal, according to the laws of the kingdom, and to execute justice accordingly." Within ten years of the cession of the islands of Bombay and St. Helena to the Company

full power was given to them for the exercise of judicial authority according to the British laws. And in 1683 Charles II granted a further Charter, empowering the Company to establish Courts of judicature at such places as they might appoint, consisting of one person learned in the civil laws, and two merchants, all to be appointed by the Company, and who were to decide according to equity and good conscience and according to the laws, and customs of merchants by such rules as the Crown should, from time to time, direct either by the Great Seal or the Privy Seal; failing which directions by such ways and means as the Judges should think best.

Upon the representation of the Court of Proprietors and the Court of Directors, Mayors' Courts were established by royal Letters Patent at Madras, Bombay and Fort William in supercession of the old Courts in 1726, (13th George I) each consisting of a Mayor and nine aldermen, seven of whom with the Mayors were required to be natural British-born subjects. They were employed to try, hear and determine all civil suits, actions and pleas between party and party, and they were declared to be Courts of Record. These Courts granted probates of Wills and administration to the effects of intestates.

By the same Letters Patent each Local Government, that is a Governor and Council, was constituted a Government Court of Record, to which an appeal lay from the decisions of the Mayors' Court in all cases involving sums under 1,000 pagodas or about Rs. 4,000. A further appeal lay to the King in Council in all other cases. The Government Court was also a Court of Oyer and Terminer, and authorized to hold quarter sessions for the trial of all offences except high treason.

By new Letters Patent, issued in 1753 (26 Geo. II) the Mayors' Courts were re-established on an improved basis at Madras, Bombay and Calcutta. A Court of requests was also established at each of these places for the determination of suits "where the debt, duty or matter in dispute should not exceed five pagodas or Rs. 20. Under these Letters

Patent, the Courts which they established were limited, in the civil side, to suits between persons other than natives of the several towns to which their jurisdiction applied—these latter being amenable to their jurisdiction only by consent of parties.

But these Courts were soon found to be quite unequal to the requirements of the country. An application was accordingly made to the Crown for a new charter of justice for Bengal.

This was the extent of the legislative and judicial authority possessed by the Company, when the events which succeeded the Battle of Plassy rendered it obligatory on them to assume the functions of sovereignty. A period of misrule and anarchy followed. Clive attempted to remedy this state of things and was successful to a certain extent. He obtained the Dewany from Sha Alum in 1765. The text of the Firmand is subjoined:—

"At this happy time our Royal Firmand, indispensably requiring obedience, is issued; that whereas in consideration of the attachment and services of the high and mighty, the noblest of exalted nobles, the chief of illustrious warriors, our faithful servants and sincere well-wishers, worthy of our royal favors, the English Company, we have granted them the Dewany of the Provinces of Bengal, Behar and Orissa, from the beginning of the Fuslee Rubby of the Bengal year 1172, as a free gift and ultungan, without the association of any other person, and with an exemption from the payment of the customs of the Dewany, which used to be paid by the Court. It is requisite that the said Company engage to be security for the sum of twenty-six lacs of Rupees a year for our royal revenue, which sum has been appointed from the Nabob Nudjum-ul-Dowla Belander, and regularly remit the same to the Royal Circar; and in this case as the said Company are obliged to keep up a large army for the protection of the provinces of Bengal Government, we have granted to them whatsoever may remain out of the revenues



of the said provinces after remitting the sum of 26 lacs of rupees to the royal Circar, and providing for the expenses of the Nizamut. It is requisite that our royal descendants, the viziers, the bestowers of dignity, the omrahs, high in rank, the great officers, the Muttasaddies of the Dewany, the managers of the business of the Sultanut, the Jaghirdars and Croories as well the future as the present using their constant endeavours for the establishment of this our royal command, leave the said office in possession of the said Company, from generation to generation, for ever and ever. Looking upon them to be assured from dismission or removal, they must, on no account whatsoever, give them any interruption, and they must regard them as excused and exempted from the payment of all the customs of the Dewany and royal demands. Knowing our orders on the subject to be most strict and positive, let them not deviate therefrom. Witness the 24th day Sophar of the 6th year of the Joloos, the 12th of August 1765.—*Aitchison's Treaties (Indian)* p 60.

Here ends the first lecture.

The second lecture begins with a detail of the happy result which followed the grant of the Dewany. By this grant, the Company were made responsible for the collection of the revenue, and directly or indirectly for the administration of civil and criminal justice. The nizamut or administration of criminal justice was left in the hands of the Nabob, who acknowledged his dependence by the receipt of Rs. fifty-three lacs a year. The collection of the revenue and the administration of civil justice were conducted through the native agency till the year 1772. The country in the vicinity of Calcutta, Burdwan, Midnapore and Chittagong was under the superintendence of the Company's European servants, but the Dewany lands were left under the immediate management of two native dewans, one of whom was posted at Moorshedabad and the other at Patna under the superintendence of a European resident in each of those towns.

In 1769, some supervisors were appointed to assist the residents in their work of superintendence, and in 1770, two councils, one at Patna and the other at Moorshedabad, were appointed to protect the Company's pecuniary interests.

With regard to criminal justice, it may be remarked that the Mahomedan Courts administered the Mahomedan Law throughout the country. The authorities in the Presidency Town were

1, The Nabob himself in all capital cases;

2, His deputy in cases of quarrels, frays and abusive names;

3, The Fouzdar in all cases not capital, judgment and sentence being passed by the Nabob;

4, Mohtesil in all cases of drunkenness, selling spirituous liquors &c;

5, The Cotwal, a peacc-officer of the night, dependent on the Fouzdaree.

In the provinces the Zemindars exercised civil and criminal jurisdiction over their several districts.

A report was made to the Nazim in capital cases only, in other cases they exercised unlimited powers.

In 1772, Warren Hastings was appointed Governor of Bengal. Wholesale changes were at once introduced. The office of Naib-Dewan was abolished. A Committee of Circuit was appointed consisting of the Governor and four members of Council. Moffusil Dewany Adwaluts were established under the supervision of the Collectors of the Revenue in each district to take cognizance of all cases of a civil nature; generally, questions of succession to the Zemindary and Talookdaree property being reserved for the decision of the Governor in Council. The Sudder Dewany Adwalut, presided over by the president and members of Council and assisted by native officers, exercised an appellate jurisdiction over the Moffusil Courts in all cases when the amount in dispute exceeded five hundred Rupees.

A Fouzdaree Adwalut was established in each district, presided over by a Kazi and a Moofly, who were assisted by two

Moulvies. These courts also were under the superintendence of the English Collectors. A Criminal Court of Appeal, called the Sudder Nizamut Adwalut, was established at Moorshedabad, presided over by a Daroga with five assistants, to wit, a chief Kazy, a chief Mufty and three Moulvies, appointed by the Nazim. This court revised the proceedings of the Fouzdaree Adwaluts, and in capital cases prepared the sentence for the warrant of the Nazim; their own proceedings being under the control of an English Committee of Revenue.

X Almost simultaneously with these local changes in the administration of justice, an Act of Parliament, commonly called the Regulating Act, was passed for the better management of the affairs of the East India Company as well in India as in Europe. It provided for the appointment of a Governor-General and four Councillors to be the Supreme Government in India, to which the Presidents and Councils of Madras and Bombay were made subordinate. It invested the Supreme Government with legislative authority, and established the Supreme Court, the Charter being dated 26th March 1774. It was a Court of Common Law as well as of equity, and exercised criminal, ecclesiastical and admiralty jurisdictions.

The judges at once assumed an attitude of hostility towards the Supreme Government, and the results that followed were far from pleasant to the country at large, as is well known to our readers.

Lecture III gives in detail an account of the arbitrary proceedings of the Supreme Court, which carried all its measures with a high hand in defiance of the executive Government, and thereby entailed upon the country the most disastrous consequences. It is needless to recapitulate them here as our readers are supposed to be quite familiar with all that took place by order of the Supreme Court during the seven years that intervened between its establishment in 1774 under the Regulating Act of 1773, and the coming into operation of the well

known Parliamentary Act of 1781. The Act of 1773 had proceeded upon a mistake. The Act of 1781 was passed to rectify the mistake that had been committed, and "for the relief of certain persons imprisoned at Calcutta under a judgment of the Supreme Court, and also for indemnifying the Governor-General and Council and all officers who have acted under their orders or authority in the undue resistance made to processes of the Supreme Court." It defined the limits of the jurisdiction of the Supreme Court which was prohibited in future from interfering with the collection of the revenue according to the practice or usage of the country, or the regulations of the Governor-General and Council. It was also declared that no person should be subject to its jurisdiction by reason of his possessing any interests in land or rents within the provinces of Bengal, Behar or Orissa, or by reason of his becoming security for the payment of such rents. Natives in the service of the Company, &c., were declared not to be subject to the jurisdiction of the Court in any matter of inheritance or succession to lands or goods, or in any matter of dealing or contract between party or parties, except in actions for wrongs or trespasses, and also, except in any civil suit by agreement of parties in writing, when they were to submit the same to the decision of the said Court. And judicial officers in the Mofussil and their subordinates were also exempted from its jurisdiction for acts done in their official capacity.

The Governor-General and his Council were made independent of the Court for acts done or orders passed in their public capacity as Governor-General and Council.

The Act also provided that in regard to suits for succession or inheritance to lands, &c., and all matters of contract, the questions involved should be determined by the Hindoo Law in the case of Hindoos, and by the Mahomedan Law in the case of Mahomedans, and where one of the parties was a Hindoo or a Maho-

medan, by the law or usages of the defendant. By far the most important provision of the Act was the recognition by Parliament of the Civil and Criminal Courts in the country, the legality of whose existence had been ignored by the Supreme Court under the Regulating Act of 1773. Under the Act of 1773 all regulations passed by the Supreme Government were declared not to have the force of law until the same had been registered in the Supreme Court. The new Act, however, dispensed with the provision, and declared that copies of all regulations passed by the Governor-General in Council should be transmitted to the Court of Directors and to one of His Majesty's Principal Secretaries of State, which regulations his Majesty might disallow or amend, and the said regulations, if not disallowed within two years, should have the force of law.

A revised Code was also passed for Bengal in 1781.

Mr. Cowell thus sums up :—" Thus the Act of Parliament, the Revised Code, the Parliamentary recognition of the Sudder and Provincial Courts, the grant of the Legislative authority, apart from the *veto* of the Supreme Court, the restriction of the powers of that Court and the declaration of the right of the Hindus and Mahomedans to their own laws and usages, were effected in 1781."

The 4th and 5th lectures treat of the Legislative Councils. The Parliamentary Acts by which the Company were empowered to legislate for their factories and settlements, have already been referred to. The most important exercise of that power occurred in 1772, when a body of laws for the guidance of the Civil and Criminal Courts, established by Warren Hastings, was passed by the President and the Council for Bengal.

The Regulating Act of 1773 authorized the Supreme Council to make laws for the good order and Civil Government of Fort William, and all factories and places subordinate thereto, but the exer-

cise of this power was subject to the supervision of the Supreme Court. It was under the powers conferred by this Act that certain regulations were passed in 1780, for the more effectual and regular administration of justice in the Sudder and Provincial Civil Courts. And early in 1781, a revised Code was passed.

The Parliamentary Act of 1781 empowered the Governor-General in Council to frame regulations for the Provincial Courts and Councils without reference to the Supreme Court. But the Court was not bound to recognize any regulation unless it had been duly registered under the Act of 1773. Copies, however, of the regulations were to be transmitted to the Home Government for approval as has already been stated. It may be observed *en passant* that it was under this enactment that the Governor-General and his Council exercised an appellate and revisional jurisdiction.

By Statute 3 and 4, William IV, registration of laws in the Supreme Court, was rendered unnecessary.

It would appear that the Supreme Council had exceeded its authority in passing the regulations to which we have referred. It was therefore thought necessary to set the matter right by a parliamentary recognition of that power, and accordingly Statute 37, George III, was passed, by which it was declared that it was essential to the prosperity of the British territories in Bengal that all regulations passed by Government should be framed into a regular Code, and printed with translations in the country-languages, and that the reasons for every regulation should be prefixed to it. Thus the Bengal Regulations, which were codified in 1793, were duly legalized.

In the year 1800 the Governor and the Council of Fort St. George were empowered by Stat. 39 and 40, George III, to frame Regulations for the Provincial Courts and Councils of that Presidency.

(To be continued.)

## ACT No. X OF 1872.

(Received the assent of the Governor-General  
on the 25th April, 1872.)

### *An Act for regulating the Procedure of the Courts of Criminal Judicature.*

WHEREAS it is expedient to consolidate  
and amend the law regulat-  
ing the Procedure of the  
Courts of Criminal Judicature, other than  
the High Courts in Presidency towns in the  
exercise of their original criminal jurisdic-  
tion, and the Courts of Police Magistrates  
in such towns; It is hereby enacted as  
follows :—

## PART I.

### CHAPTER I.

#### PRELIMINARY, REPEAL, LOCAL EXTENT AND DEFINITIONS.

Short title. 1. This Act may be called  
"The Code of Criminal Pro-  
cedure."

Local extent. It extends to the whole of British India,  
but shall not, except as here-  
inafter provided, affect the  
procedure of the High Courts or Police Ma-  
gistrates in Presidency towns;

Commencement. And it shall come into  
force on the first day of Sep-  
tember 1872.

2. The enactments, mentioned in the first  
schedule hereto annexed, are  
repealed to the extent spe-  
cified in the third column  
of the said schedule.

Wherever a special form of procedure is  
prescribed by any law, not  
expressly repealed in the first  
schedule to this Act, it shall  
not be deemed to have been impliedly  
repealed by reason of its being inconsistent  
with the provisions of this Code.

In every Act passed before this Act, in  
which reference is made to  
the Code of Criminal Proce-  
dure, such reference shall be  
taken to be made to this Act.

In every Act, passed before this Act, the  
expressions "officer exercis-  
ing the powers of a Magis-  
trate," "Subordinate Magis-  
trate, first class," and "Subordinate Magis-  
trate, second class," shall, respectively, be  
deemed to mean "Magistrate of the first  
class," "Magistrate of the second class," and  
"Magistrate of the third class," as defined in  
this Act.

The references made in the enactments  
specified in column one of  
the fifth schedule hereto to  
the sections of the former  
Code of Criminal Procedure specified in  
column two of the said Schedule, shall be  
deemed to be made to the sections of this  
Code directed in the third column of the  
said schedule to be substituted for the said  
sections in column two.

Notifications published and orders made  
under any section of any Act hereby re-  
pealed, shall be deemed to have been pub-  
lished and made under the corresponding  
section of this act.

3. Cases pending in any Criminal Court  
when this Act comes into  
force shall be decided as far  
as may be according to the procedure pro-  
vided in this Act.

4. In this Act the following words and  
expressions have the follow-  
ing meanings unless a differ-  
ent intention appears from the context :—

"Special law." "Special law" means a  
law applicable to a particu-  
lar subject.

"Local law" "Local law" means a law  
applicable to a particular  
part of British India.

"Investigation" includes all the proceed-  
ings by the Police, author-  
ized by this Act, for the col-  
lection of evidence.

"Inquiry" includes any inquiry which  
may be conducted by a  
Magistrate or Court under  
this Act.

"Inquired into" means and includes every  
proceeding preliminary to  
trial.

"Trial" means the proceedings taken in  
Court after a charge has been  
drawn up and includes the  
punishment of the offender.

It includes the proceedings under Chapters XVI and XVIII from the time when the accused appears in Court.

"Judicial Proceeding" means any proceeding in the course of which evidence is or may be taken, or in which any judgment, sentence or final order is passed on recorded evidence.

"Written" includes "printed," "lithographed," "photographed" and "engraved."

"Criminal Court" means and includes every Judge or Magistrate, or body of Judges or Magistrates inquiring into or trying any criminal case or engaged in any judicial proceeding.

"Province" means the territories under the Government or Administration of any Local Government.

"Presidency town" means the local limits of the ordinary original civil jurisdiction of the High Courts of Calcutta, Madras or Bombay.

"High Court" means, in reference to proceedings against European British subjects, or persons jointly charged with European British subjects, the High Courts of Calcutta, Madras, Bombay, the High Court for the North-Western Provinces, and the Chief Court of the Panjab.

In other cases "High Court" means the highest Court of criminal appeal or revision in any province.

"Session case" means and includes all cases specified in column 7 of the fourth schedule to this Act as cases triable by a Court of Session and all cases which Magistrates commit to a Court of Session although they might have tried them themselves.

In the case of offences created by special and local laws, "Session case" means cases which are triable by the Court of Session or which the Magistrate commits to the Court of Session, though he might have tried them himself.

"Magistrate's case" means and includes all cases specified in column 7 of the fourth schedule to this Act as cases triable by Magistrates and all cases which Magistrates try themselves, although they might have committed them for trial to a Court of Session.

"Cognizable offence or case" means an offence for or a case in which a Police officer may, by any law in force for the time being, arrest without warrant.

"Non-cognizable offence or case" means an offence for or a case in which a Police officer may not arrest without warrant.

"Summons case" means an offence of the class described in section one hundred and forty-eight.

"Warrant case" means an offence of the class described in section one hundred and forty-nine.

"Bailable offence or case" means an offence for or a case in which bail may be taken under the fourth schedule to this Act, or by any other law in force for the time being.

"Non-bailable offence or case" means an offence for or a case in which bail may not be taken under the fourth schedule to this Act, or by any law in force for the time being.

## PART II.

### CONSTITUTION AND POWERS OF THE CRIMINAL COURTS.

#### CHAPTER II.

##### OF CRIMINAL COURTS.

5. Besides the High Courts, there shall be four grades of Criminal Courts in British India—

I.—The Court of the Magistrate of the 3rd class.

II.—The Court of the Magistrate of the 2nd class.

III.—The Court of the Magistrate of the 1st class.

IV.—The Court of Session.

6. All inquiries by Magistrates shall be held according to the provisions hereinafter contained.

7. All criminal trials in British India shall be held before the Courts specified in the fourth schedule to this Act, or before the Courts specified in any law

by which the offence is created, according to the provisions hereinafter contained.

8. Offences punishable under any law, other than the Indian Penal Code, containing no distinct provision as to the Court or Officer before which or before whom they are to be tried, may be inquired into and tried, according to the provisions hereinafter contained, by the Criminal Courts appointed under this Act. But no such Court shall award any sentence in excess of its powers.

A Magistrate of the third class shall not try any such offence unless it is punishable with less than one year's imprisonment, nor shall a Magistrate of the second class try any such offence unless it is punishable with less than three years' imprisonment.

9. All judges of Criminal Courts, other than the High Courts, and Magistrates shall be appointed and may be removed by the Local Government; but such officers as are now appointed or removed by the Government of India shall continue to be so appointed or removed.

10. All existing Judges and Magistrates shall be deemed to have been appointed under this Act.

11. Offences committed by European British subjects shall be inquired into and tried according to the provisions of Chapter VII, and not otherwise; but the other provisions of this Act shall apply to all persons without distinction of race unless a contrary intention is expressed.

### CHAPTER III.

#### OF COURTS OF SESSION.

12. Every province shall be divided into Sessions Divisions.

13. The Local Government shall have power to alter, from time to time, the number or extent of such divisions.

14. The existing local jurisdictions of Courts of Session shall be Sessions Divisions, unless and until they are so altered.

15. There shall be a Court of Session in every Sessions Division.

It shall have power to try any offence and to pass upon any offender any sentence authorized by law, subject to the provisions of this Act.

16. There shall be a Sessions Judge for every Sessions Division. The Sessions Judge shall exercise all the powers of the Court of Session in his Sessions Division.

17. The Local Government may appoint Additional Sessions Judges or Joint Sessions Judges who shall exercise all the powers of a Court of Session in one or more Sessions Divisions in which they may be directed to act, but shall try such cases only as the Local Government directs them to try, or as the Sessions Judge of the Division makes over to them for trial.

18. The Local Government may also appoint Assistant Sessions Judges who shall exercise all the powers of a Court of Session in the Sessions Division to which they may be attached, except the power of hearing appeals, and of passing sentences of death, or transportation, or imprisonment for more than seven years; but they shall try those cases only which the Sessions Judge of the Sessions Division makes over to them either by general orders or by a special order.

Any sentence of more than three years' imprisonment passed by an Assistant Sessions Judge shall be subject to confirmation by the Sessions Judge. The Sessions Judge may either confirm, modify or annul, such sentence of the Assistant Sessions Judge.

### CHAPTER IV.

#### OF MAGISTRATES AND THEIR POWERS.

19. Magistrates shall be either—

Magistrates of the 1st class,

Magistrates of the 2nd class, or

Magistrates of the 3rd class.

20. The powers of Magistrates in respect to the trial of offences and Sentences which Magistrates may pass. persons convicted of them are as follows—

Magistrates of the first class may pass the following sentences:—

Imprisonment not exceeding the term of two years (including such solitary confinement as is authorized by law);

Fine to the extent of one thousand rupees;

Whipping.

Magistrates of the second class may pass the following sentences:—

Imprisonment not exceeding six months (including such solitary confinement as is authorized by law);

Fine not exceeding two hundred rupees;

Whipping.

Magistrates of the third class may pass the following sentences:—

Imprisonment not exceeding one month;

Fine not exceeding fifty rupees.

A Magistrate of the third class may not pass a sentence of solitary confinement, or of whipping.

Any Magistrate may pass any lawful sentence, combining any of the sentences which he is authorized by law to pass.

*Explanation.*—A Magistrate may award imprisonment in default of payment of fine in addition to the full term of imprisonment which, under this section, he is competent to award.

21. In addition to the powers given in section twenty, the following Powers conferred upon Magistrates. powers are conferred, as hereinafter provided, upon Magistrates by this Act:—

(1.) Power to make over cases to a Subordinate Magistrates. (s. 44.)

(2) Power to pass a sentence on proceedings recorded by a subordinate Magistrate. (s. 46.)

(3) Power to withdraw cases and to try or refer them for trial. (s. 47.)

(4) Power to withdraw or refer appeals from convictions by Magistrates of the 2nd and 3rd classes. (s. 47.)

(5) Power to arrest an accused person found in Court. (s. 104.)

(6) Power to order the Police to investigate and offence. (s. 110.)

(7) Power to record confessions or statements during a Police investigation. (s. 122.)

(8) Power to authorize detention of a person during a Police investigation. (s. 124.)

(9) Power to hold an inquest. (s. 135.)

(10) Power to entertain complaints and receive Police reports. (s. 141.)

(11) Power to entertain cases without complaint. (s. 142.)

(12) Power to commit for trial. (s. 143.)

(13) Power to issue process for person within jurisdiction who has committed an offence outside Magistrate's local jurisdiction. (s. 157.)

(14) Power to direct warrant to landholder. (s. 162.)

(15) Power to arrest offender in presence of Magistrate. (s. 166.)

(16) Power to endorse warrant, or to order the removal of an accused person arrested under a warrant. (ss. 168 and 170.)

(17) Power to issue proclamation in cases judicially before him. (ss. 171 and 353.)

(18) Power to attach and sell property in cases judicially before him. (ss. 172 and 354.)

(19) Power to try summarily. (s. 222.)

(20) Power to hear appeals from convictions by Magistrates of the 2nd and 3rd classes. (s. 266.)

(21) Power to call for proceedings. (ss. 295 and 296.)

(22) Power to quash convictions in certain cases. (s. 328.)

(23) Power to issue a search-warrant for letter in Post Office. (s. 369.)

(24) Power to endorse a search-warrant and order delivery of thing found. (ss. 372, 373 and (376.)

(25) Power to issue search-warrant otherwise than in the course of an inquiry. (s. 377.)

(26) Power to revise bail orders. (s. 398.)

(27) Power to sell perishable property of a suspicious character. (s. 415.)

(28) Power to sell suspicious or stolen property. (s. 417.)



- (29) Power to demand security to keep the peace. (s. 491.)
- (30) Power to discharge recognizances to keep the peace. (s. 500.)
- (31) Power to demand security for good behaviour. (ss. 504 and 505.)
- (32) Power to discharge person bound to be of good behaviour. (s. 511.)
- (33) Power to issue order to prevent obstruction, &c. (s. 518.)
- (34) Power to issue order prohibiting repetition of nuisance. (s. 519.)
- (35) Power to make orders, &c., in local nuisance cases. (s. 521.)
- (36) Power to make orders, &c., in possession cases. (s. 530.)
- (37) Power to make orders of maintenance. (s. 536.)

Powers common to all Magistrates. 22. Magistrates of all classes shall, as such, have the following powers:—

- (1.) Power to arrest an accused person found in Court. (s. 104.)
- (2.) Power to record confessions or statements during a Police investigation. (s. 122.)
- (3.) Power to authorize detention of a person during a Police investigation. (s. 124.)
- (4.) Power to arrest offender in the presence of Magistrate. (s. 166.)
- (5.) Power to endorse warrant, or to order the removal of an accused person arrested under a warrant. (ss. 168 and 170.)
- (6.) Power to issue proclamation in cases judicially before him. (ss. 171 and 353.)
- (7.) Power to attach and sell property in cases judicially before him. (ss. 172 and 354.)
- (8.) Power to endorse a search-warrant and order delivery of thing found. (ss. 372, 373 and 376.)
- (9.) Power to sell perishable property of a suspicious character. (s. 415.)

Powers which Local Government and Magistrate of the District may confer on Magistrates of the 3rd class. 23. In addition to the powers mentioned in section twenty-two a Magistrate of the third class may be invested with the following powers:—

- (a.) By the Local Government—
- (1.) Power to hold inquests. (s. 135.)

- (2.) Power to entertain complaints of offences in cases in which he has jurisdiction to try or to commit for trial. (s. 141.)
- (3.) Power to commit for trial. (s. 143.)
- (4.) Power to issue order to prevent obstruction, &c. (s. 518.)
- (5.) Power to issue order prohibiting repetition of nuisance. (s. 519.)
- (b.) By the Magistrate of the District—
- (1.) Power to hold inquests. (s. 135.)
- (2.) Power to entertain complaints of offences in cases in which he has jurisdiction to try or to commit for trial. (s. 141.)
- (3.) Power to issue order to prevent obstruction, &c. (s. 518.)
- (4.) Power to issue order prohibiting repetition of nuisance. (s. 519.)

Powers of Magistrates of the 2nd class. 24. Magistrates of the 2nd class shall, as such, in addition to the powers mentioned in section twenty-two, have the following power:—

- (1.) Power to order the Police to investigate an offence in which the Magistrate has jurisdiction to try or to commit for trial. (s. 110.)

Powers which may be conferred on Magistrates of the 2nd class. 25. In addition to the powers given and referred to in section twenty-four, a Magistrate of the 2nd class may be invested with the following powers:—

- (a.) By the Local Government—
- (1.) Power to hold inquests. (s. 135.)
- (2.) Power to entertain complaints and receive Police reports in cases in which he has jurisdiction to try or to commit for trial. (s. 141.)
- (3.) Power to entertain without complaint cases which he has jurisdiction to try or to commit for trial. (s. 142.)
- (4.) Power to commit for trial. (s. 143.)
- (5.) Power to issue order to prevent obstruction, &c. (s. 518.)
- (6.) Power to issue order prohibiting repetition of nuisance. (s. 519.)
- (b.) By the Magistrate of the District—
- (1.) Power to hold inquests. (s. 135.)
- (2.) Power to entertain complaints and receive Police reports in cases in which he has jurisdiction to try or to commit for trial. (s. 141.)

(3.) Power to issue order to prevent obstruction, &c. (s. 518.)

(4.) Power to issue order prohibiting repetition of nuisance. (s. 519.)

26. Magistrates of the 1st class shall, as such, in addition to the

Powers of Magistrates of the 1st class.

powers mentioned in sections twenty-two and twenty-

four, have the following powers :—

(1.) Power to commit for trial. (s. 143.)

(2.) Power to issue search-warrant otherwise than in the course of an inquiry. (s. 377.)

(3.) Power to demand security to keep the peace. (s. 491.)

(4.) Power to demand security for good behaviour. (ss. 504 and 505.)

(5.) Power to make orders, &c., in possession cases. (s. 530.)

(6.) Power to make orders of maintenance. (s. 536.)

27. In addition to the powers given and referred to in section twenty-

Powers which may be conferred on Magistrates of the 1st class.

six, a Magistrate of the first class may be invested with the following powers :—

(a.) By the Local Government—

(1.) Power to make over cases taken up on complaint, &c. to a Subordinate Magistrate. (s. 44.)

(2.) Power to hold inquests. (s. 135.)

(3.) Power to entertain complaints of offences, and receive Police reports. (s. 141.)

(4.) Power to entertain cases without complaint. (s. 142.)

(5.) Power to issue process for person within jurisdiction who has committed an offence outside Magistrate's local jurisdiction. (s. 157.)

(6.) Power to try summarily. (s. 222.)

(7.) Power to hear appeals, from convictions by Magistrates of the 2nd and 3rd classes. (s. 266.)

(8.) Power to sell suspicious or stolen property. (s. 417.)

(9.) Power to issue order to prevent obstruction, &c. (s. 518.)

(10.) Power to issue order prohibiting repetition of nuisance. (s. 519.)

(11.) Power to make orders, &c., in local nuisance cases. (s. 521.)

(b.) By the Magistrate of the District—

(1.) Power to hold inquests. (s. 135.)

(2.) Power to entertain complaints of offences, and receive Police reports. (s. 141.)

(3.) Power to issue order to prevent obstruction, &c. (s. 518.)

(4.) Power to issue order prohibiting repetition of nuisance. (s. 519.)

28. Magistrates who, under the provisions

Powers of Magistrates of Divisions of Districts.

of section forty, are Magistrates of Divisions of Districts shall, as such have all

the powers given to Magistrates of the first class, and referred to in section twenty-six, and, in addition, shall have the following powers :—

(1.) Power to make over cases to a Subordinate Magistrate. (s. 44.)

(2.) Power to pass sentence on proceedings recorded by a Subordinate Magistrate. (s. 46.)

(3.) Power to withdraw cases, but not appeals, and to try or refer them for trial. (s. 47.)

(4.) Power to hold inquests. (s. 135.)

(5.) Power to entertain complaints of offences, and receive Police reports. (s. 141.)

(6.) Power to entertain cases without complaint. (s. 142.)

(7.) Power to issue process for person within jurisdiction who has committed an offence outside Magistrate's local jurisdiction. (s. 157.)

(8.) Power to sell suspicious or stolen property. (s. 417.)

(9.) Power to issue order to prevent obstruction, &c. (s. 518.)

(10.) Power to issue order prohibiting repetition of nuisance. (s. 519.)

(11.) Power to make orders in local nuisance cases. (s. 521.)

Provided that, if a Magistrate of a Division of a District exercise the powers of a Magistrate of the second class, he shall not have power to demand security to be of good behaviour.

29. In addition to the powers given and

Powers which Local Government may confer on Magistrates of Divisions of Districts.

referred to in section twenty-eight, the Local Government may confer on a Magistrate

of a Division of a District, exercising the powers of a Magistrate of the first class, the following powers :—

(1.) Power to try summarily. (s. 222.)

(2.) Power to hear appeals from convictions by Magistrates of the second and third classes. (s. 266.)

30. Magistrates of Districts may, as such, exercise all the powers mentioned in section twenty-one.

Powers of Magistrates of Districts.

31. All other powers given by this Act or by any other law in force may be exercised by the officers or Courts to whom or to which they are given.

Saving of other powers.

32. If any Magistrate, not being empowered by law in that behalf, does any one of the following things :—

Irregularities which do not vitiate proceedings.

- (1.) If he makes over a case, taken up on complaint, &c., to another Magistrate,
- (2.) If he withdraws a case and tries it himself, or refers a case for trial,
- (3.) If he orders the Police to investigate an offence,
- (4.) If he holds an inquest,
- (5.) If he entertains a complaint or receives a Police report,
- (6.) If he issues process for the apprehension of a person within his local jurisdiction who has committed an offence outside his local jurisdiction,
- (7.) If he issues a search-warrant otherwise than in the course of an inquiry,

his proceedings shall not be set aside on the ground that he was not so empowered.

33. If any Magistrate, not being empowered by law, commits an accused person to take his trial before a Court of Session or High Court, the Court to which the commitment was made may, after perusal of the proceedings, accept the commitment if it considers that the accused person has not been prejudiced, unless the accused person has objected to the jurisdiction of the committing Magistrate during the inquiry and before the order of commitment.

When irregular commitments may be validated.

If such Court considers that the accused person was prejudiced, or if he objected to the jurisdiction of the committing Magistrate during the inquiry, and before the order of commitment, it shall quash the commitment, and direct a fresh inquiry by a competent Magistrate.

34. If any Magistrate, not being empowered by law in that behalf, does any of the following things, his proceedings shall be void; that is to say :—

Irregularities which render proceedings void.

- (1.) If he passes a sentence on proceedings recorded by another Magistrate,
- (2.) If he entertains a case without complaint,
- (3.) If he attaches and sells property under section 172,
- (4.) If he tries an offender summarily,
- (5.) If he decides an appeal,
- (6.) If he calls for proceedings,
- (7.) If he issues a search-warrant for a letter in the Post Office,
- (8.) If he revises a bail order,
- (9.) If he sells suspicious or stolen property under section 417,
- (10.) If he demands security to keep the peace,
- (11.) If he discharges recognizances to keep the peace,
- (12.) If he demands security for good behaviour,
- (13.) If he discharges a person lawfully bound to be of good behaviour,
- (14.) If he makes an order in a local nuisance case,
- (15.) If he issues an order to prevent an obstruction,
- (16.) If he prohibits the repetition of a nuisance,
- (17.) If he makes an order in a possession case, or
- (18.) If he makes an order for maintenance.

#### THE MAGISTRATE OF THE DISTRICT. \*

35. In every district there shall be a Magistrate of the first class appointed by the Local Government who shall be called the Magistrate of the District and shall exercise throughout his district all the powers of a Magistrate.

Magistrate of the District.

36. In the territories subject to the Lieutenant-Governor of the Panjáb and in the territories administered by the Chief Commissioners of Oudh, the Central Provinces and British Burma, in Coorg, and in those parts of the other provinces in which there are Deputy Commissioners or Assistant Com-

Powers with which Deputy Commissioners and chief executive officers of District may be invested.

missioners, the Local Government may invest the Deputy Commissioner, or other chief officer charged with the executive administration of the district in criminal matters, with power to try as a Magistrate all offences not punishable with death, and to pass sentence of imprisonment for a term not exceeding seven years, including such solitary confinement as is authorized by law, or of fine, or of whipping, or any combination of these punishments authorized by law; but any sentence of upwards of three years' imprisonment passed by any such officer shall be subject to the confirmation of the Sessions Judge to whom such Deputy Commissioner is subordinate. Such Sessions Judge may either confirm, modify or annul any sentence referred for confirmation.

#### SUBORDINATE MAGISTRATES.

37. The Local Government may appoint as many other persons besides the Magistrate of the District, as it thinks fit, to be Magistrates of the first, second or third class in the District.

All such Magistrates shall be subordinate to the Magistrate of the District, but neither the Magistrate of the District, nor the Subordinate Magistrates shall be subordinate to the Sessions Judge except to the extent and in the manner provided by this Act.

The Local Government shall not have power to direct that any Magistrate may try any offence which Magistrates of his class are not authorized to try, or pass any sentence which Magistrates of his class are not authorized to pass by section twenty.

38. The Local Government may, by notification in the official Gazette, prescribe the local limits of the jurisdiction of a Magistrate of the District and may by such notification from time to time alter such local limits.

39. The Local Government may divide any district into divisions, and from time to time alter their limits. All existing divisions of districts which are now usually put under the charge of a Magistrate shall be divisions until their limits are so altered.

40. The Local Government may place any Magistrate of the 1st or 2nd class in charge of a division of a district.

Such Magistrate shall be called a Magistrate of a Division of a District and shall exercise the powers conferred on him under this Act, or under any law for the time being in force, subject to the control of the Magistrate of the District.

The Local Government may, if it thinks fit, delegate its powers under this section to the Magistrate of the District.

41. Every Magistrate in a Division of a District shall be subordinate to the Magistrate of the Division of the District, subject however, to the general control of the Magistrate of the District.

42. The Local Government may confer upon any person all or any of the powers of a Magistrate of the 1st, 2nd, or 3rd class, in respect to particular offences, or to a particular class or particular classes of offences, or in regard to offences generally, in any part of a district or in any one or more districts, subject to such Local Government.

Such Magistrates shall be called "Special Magistrates."

43. In conferring powers under this Act the Local Government may empower persons specially by name, or classes of officials generally by their official titles.

44. The Magistrate of the District or any Magistrate of a Division of a District, may make over any criminal case taken up by him on suspicion, or brought before him on complaint, or on report by the Police, for inquiry or trial to any Magistrate subordinate to him, to be dealt with to the extent of the powers with which the subordinate Magistrate may have been invested under the provisions hereinbefore contained.

The Magistrate making the reference may, if the case was brought forward on complaint, before such reference, examine the complainant as prescribed in this Act; but if he does not do so, the Magistrate to whom the case is referred shall proceed as if the complaint had been made to him.

The order of reference shall be recorded in a proceeding, and, if the case has been brought forward on the report of a Police officer, shall be recorded on such report; and all processes issued for causing the attendance of the accused person or the witnesses shall direct them to attend before the Magistrate to whom the case has been referred.

The Magistrate making the reference may, if he thinks proper, retransfer to his own file the case referred under paragraph one of this section, and when he has done so, and not before, may proceed therein.

45. If, in the course of a proceeding before a Magistrate, the evidence appears to him to warrant a presumption that the accused person has been

*Procedure of Magistrate in cases beyond his jurisdiction.*

guilty of an offence which such Magistrate is not competent to try,

or for which he is not competent to commit the accused person for trial,

he shall stay proceedings and submit the case to any Magistrate to whom he is subordinate, or to such other Magistrate, having jurisdiction, as the Magistrate of the District directs.

The Magistrate to whom the case is submitted shall either try the case himself; or refer it to any officer, subordinate to him, having jurisdiction; or he may commit the accused person for trial.

In any such case, such Magistrate or other officer as aforesaid shall examine the parties and witnesses, and shall proceed in all respects as if no proceedings had been held in any other Court.

But any statement or confession duly made by an accused person in the course of the proceedings before the Magistrate, before whom the case was originally brought, shall be admissible as evidence in all subsequent proceedings.

46. Whenever a Magistrate of the 2nd or 3rd class, having jurisdiction, finds an accused person guilty, and considers

*Procedure when Magistrate cannot pass sentence sufficiently severe.*

that he ought to receive a more severe punishment than such Magistrate is competent to adjudge, he may record the finding and, if sentence has not been passed, may submit his proceedings, and forward the accused person to the Magistrate

of the District, or to the Magistrate of the Division of the District, to whom he is subordinate.

The Magistrate, to whom the proceedings are submitted, may, if he thinks fit, examine the parties and recall and examine any witness who has already given evidence in the case; and may summon any further witnesses and take their evidence; and shall pass such judgment, sentence or order in the case as he deems proper, and as he according to law: Provided that he shall not exceed the powers ordinarily exercisable by him under section twenty of this Act.

The Magistrate who originally dealt with the case may, if he is empowered to hold inquiries into cases triable by the Court of Session and to commit persons to take their trial before such Court, instead of submitting his proceedings to another Magistrate, commit the accused person for trial before the Court of Session instead of finding him guilty.

47. Magistrates of Districts and Magistrates of Divisions of Districts may respectively withdraw any criminal case from any Magistrate subordinate to them, and may inquire into or try the case themselves, or refer it for inquiry or trial to any other such Magistrate competent to inquire into or try the same.

Magistrates of Districts may withdraw any criminal appeal from any Subordinate Magistrate who has been authorized to hear appeals from the convictions of Magistrates of the 2nd and 3rd classes, and may refer criminal appeals to any competent Magistrate subordinate to them.

48. The Local Government may authorize the Magistrate of the District to withdraw from the Magistrates subordinate to him, whether in charge of divisions of districts or not, either such classes of cases as he thinks proper, or particular classes of cases.

49. The Magistrate of the District, under the general or special orders of the Local Government, may authorize any Magistrate subordinate to him to entertain complaints

*Local Government may authorize Magistrate of District to distribute business by localities.*

arising within certain local limits, and may from time to time vary such orders: Provided that no such Magistrate shall be authorized to entertain any complaint of any offence which he is not competent to try or to commit for trial.

#### MAGISTRATES' BENCHES.

50. The Local Government may direct any two or more Magistrates to sit together as a bench, and may invest such bench with the powers of a Magistrate of the 1st, 2nd or 3rd class, and direct it to try such cases or such classes of cases only and within such limits as it thinks fit.

51. In the absence of any special direction as to the powers of any such bench, it shall have the powers of a Magistrate of the highest class to which any one of its members belongs, and who is present taking part in the proceedings.

52. The Magistrate of the District may, subject to the general orders of the Local Government, make rules for the guidance of Magistrate's benches in his district.

Such rules shall not be inconsistent with the provisions of this Act and may deal with the following subjects:—

The classes of cases to be tried.

The times and places of sitting.

The constitution of the bench for conducting trials.

The mode of settling differences of opinion which may arise between the Magistrates in Session.

53. The Magistrate of the District may, subject to the like orders, vary or annul, from time to time, any rules made by himself or by his predecessor under the last preceding section.

#### CONTINUANCE AND ALTERATION OF POWERS.

54. The Local Government may vary or cancel any powers with which any person may have been invested under this Act or any enactment hereby repealed.

55. When, in consequence of the office of a Magistrate of the District becoming vacant, any officer succeeds temporarily to the chief executive administration of the district in criminal matters, such officer shall, pending the orders of the Local Government, exercise all the ordinary powers and perform all the duties of the Magistrate of the District.

56. Whenever any person holding an office in the service of Government, who has been invested with any powers, under this Act or any enactment hereby repealed, in any district, is transferred to an equal or higher office of the same nature within another district, he shall, unless the Local Government otherwise directs, continue to exercise the same powers in the district to which he is so transferred.

#### CHAPTER V.

##### OF PUBLIC PROSECUTORS.

57. The Local Government may, if it thinks proper, appoint officers to be called public prosecutors.

58. Public prosecutors may be appointed either for a particular case, or for particular classes of cases, or for all cases throughout the whole or any part of any province.

59. Any Court inquiring into or trying any case may permit any person to conduct the case as prosecutor; but no person shall be entitled to do so without such permission. Any person permitted to prosecute may conduct the prosecution personally or by counsel.

60. The public prosecutor may appear and plead without any written authority before all Courts in which any case under his charge is under inquiry, trial, or appeal; and if any private person instructs any barrister, attorney, pleader, or vakil to prosecute any person in any case under the charge of the public prosecutor,

the public prosecutor shall have the management of the case, and such other person shall act under his directions.

31. The public prosecutor may, with the consent of the Court, withdraw any charge against any person in any case of which he is in charge; and upon such withdrawal, if it is made whilst the case is under inquiry, the accused person shall be discharged. If it is made when he is under trial, the accused person shall be acquitted.

62. If an appeal is brought in any case in which any person, prosecuted by the public prosecutor, has been convicted, notice of such appeal and a copy of the grounds of appeal shall be given to such public prosecutor by the Appellate Court, and the Court shall also give him due notice of the time and place at which such appeal is to be heard.

## CHAPTER VI.

### THE PLACE OF INQUIRY AND TRIAL.

63. Every offence shall be inquired into, and, if tried by a Magistrate, shall be tried in the district in which it was committed. If tried by a Court of Session it shall be tried by that Court of Session to which the Magistrate commits.

Magistrates shall ordinarily commit to the Court of Session for the Sessions Division, in which the district to which they are appointed is situated; but the Local Government may direct that any cases or class of cases committed in any district may be tried in any Sessions Division.

*Explanation.*—Offences created by local and special laws may be inquired into and tried in any place where the inquiry or trial might be held under the provisions of those laws or of this Code.

64. Whenever it appears to the High Court that such order will promote the ends of justice, or tend to the general convenience of the parties or witnesses, it may direct the transfer of any particular criminal case, or appeal, or class of cases or appeals from a

Criminal Court, subordinate to its authority, to any other such Criminal Court of equal or superior jurisdiction,

or may order that any offence shall be inquired into or tried in any district or division of a district, other than that in which the offence has been committed, or that it shall be tried before itself. If the High Court withdraws any case from any other Court for trial before itself, it shall observe the same procedure which that Court would have observed if the case had not been so withdrawn.

Provided that the orders issued under this section shall not be repugnant to orders issued by the Local Government under the last preceding section.

65. When a person is accused of the commission of any offence by reason of anything which has been done, or of anything which has been omitted to be done, and of any consequence which has ensued, such offence may be inquired into or tried in any district in which any such thing has been done, or omitted to be done, or any such consequence has ensued.

#### Illustrations.

(a.) A is wounded in the district of X and dies in district Z. The offence of the culpable homicide of A may be inquired into and tried either in X or Z.

(b.) A is wounded in the district of X and is, during twenty days, unable to follow his ordinary pursuits in the district Y, where he is being treated. The offence of causing grievous hurt to A may be inquired into and tried either in X or Y.

(c.) A is put in fear of injury in district X, and is thereby induced, in the district of Y, to deliver property to the person who put him in fear. The offence of extortion committed on A may be inquired into and tried either in district X or district Y.

66. When an act is an offence by reason of its relation to any other act which is also an offence, a charge of the first-mentioned offence may be inquired into and tried either in the district in which it happened or in the district in which the offence, with which it was so connected, happened.

#### Illustrations.

(a.) A charge of abetment may be inquired into and tried either in the district in which the abetment was committed, or in the district in which the offence abetted was committed.



(b.) A charge of receiving or retaining stolen goods may be inquired into and tried, either in the district in which the goods were stolen, or in any district in which any of them were at any time dishonestly received or retained.

(c.) A charge of wrongfully concealing a person known to have been kidnapped may be inquired into and tried in the district in which the wrongful concealing or in the district in which the kidnapping took place.

(d.) A, B, C and others combine together to abet the waging of war against the Queen. Any of the conspirators may be tried in any district in which acts were done by any one of the persons with whom he or they conspired in pursuance of the original concerted plan and with reference to the common object.

Place for inquiry or trial where scene of offence is uncertain ;  
or not in one district only ;

where the offence is a continuing one and continues to be committed in more districts than one ;  
or

or consists of several acts,

where it consists of several acts done in different districts, it may be inquired into and tried in any one of any of such districts.

#### Illustrations.

(a.) An offence committed on a journey or voyage may be inquired into and tried in any district, through which the person by whom the offence was committed, or the person against whom, or the thing in respect of which, the offence was committed passed in the course of that journey or voyage.

(b.) An offence committed near the boundary between two districts may be inquired into and tried in either.

(c.) A charge of being a thug or of having belonged to a gang of dacoits may be inquired into and tried wherever the person charged happens to be when the charge is made.

(d.) A charge of having escaped from custody may be inquired into and tried wherever the person charged happens to be when the charge is made.

(e.) A charge of criminal misappropriation or of criminal breach of trust may be inquired into and tried either in the district in which the property, which is the subject of the offence, was received, or in the district or districts in which the whole or any part of it has been misappropriated, or where the offence of criminal breach of trust has been wholly or partly committed.

(f.) A steals a buffalo from B in district W, and personally or by his agents conveys the buffalo through districts X and Y into district Z. This is a continuing offence, and A may be tried either in W, X, Y or Z.

68. The offence of murder as a thug, dacoity, or dacoity with murder may be inquired into and tried wherever the person accused may happen to be when arrested, or in any other district in which he might be tried under any other provision of this Code or any other law relating to the trial of such offence.

69. Whenever any doubt arises as to the district in which any offence should be inquired into or tried, the High Court, within whose jurisdiction the offender is apprehended, may decide in which district the offence shall be inquired into or tried.

70. No sentence or order of any Criminal Court shall be liable to be set aside merely on the ground that the investigation, inquiry or trial was held in a wrong district or Sessions division, unless it is proved or appears that the accused person was actually prejudiced in his defence, or the prosecutor in his prosecution, by such error, in either of which cases a new trial may be ordered.

#### CHAPTER VII.

#### OF CRIMINAL JURISDICTION OVER EUROPEAN BRITISH SUBJECTS.

71. The expression "European British subjects" means in this Act—

(1) All subjects of Her Majesty born, naturalized, or domiciled in the United Kingdom of Great Britain and Ireland or in any of the European, American, or Australian Colonies or possessions of Her Majesty, or in the Colony of New Zealand, or in the Colony of the Cape of Good Hope or Natal.

(2) The children and grandchildren of any such person by legitimate descent.

72. No Magistrate, or Justice of the Peace, or Sessions Judge shall have jurisdiction to inquire into a complaint or try a charge against a European British subject unless he is himself a European British subject.

No Magistrate shall have such jurisdiction unless he is a Magistrate of the 1st class and a Justice of the Peace.

No Justice of the Peace shall have such jurisdiction unless he is a Magistrate of the 1st class.

**73. Any Magistrate who is authorized**

Who may hear complaints and issue process.

by law to entertain complaints, may entertain against

European British subjects such complaints as he is authorized to entertain in the case of other persons.

If he issues any process for the purpose of compelling the appearance of a European British subject accused of an offence, such process must be returnable before a Magistrate competent to inquire into or try the case.

Magistrates of the 1st class, being European British subjects, and Justices of the Peace, may inquire into complaints against European British subjects.

**74. Any competent Magistrate may inquire into complaints of any offence made against a European British subject.**

If the offence complained of is a Magistrate's case and can, in the opinion of such Magistrate, be adequately punished by him, he shall proceed as is hereinafter in this Code directed, according to the nature of the offence; and, on conviction, may pass on such European British subject any sentence warranted by law, not exceeding three months' imprisonment, or fine, up to one thousand rupees or both.

**75. When the offence complained of cannot, in the opinion of such Magistrate, be adequately punished by him, and is not punishable with death or with transportation for life, such Magistrate shall, if he thinks that the accused person ought to be committed, commit him to the Court of Session.**

When commitment is to be to Court of Session.

able with death or transportation for life, the commitment shall be to the High Court.

**76. Sessions Judges or Additional Sessions Judges, and, when specially empowered in that behalf by the Local Government, Assistant Sessions Judges who are European British subjects and who have been Assistant**

Jurisdiction of Court of Session.

Sessions Judges for not less than three years, may pass on European British subjects any sentence, warranted by law, not exceeding one year's imprisonment, or fine, or both.

If at any stage of the proceedings, the Sessions Judge thinks the offence cannot be adequately punished by such a sentence, he

When Sessions Judge finds his powers inadequate. shall record his opinion to that effect and transfer the case to the High Court. The Sessions Judge may either himself bind over, or direct the committing Magistrate to bind over the complainant and witnesses to appear before such High Court.

**77. If the Sessions Judge of the Sessions division, within which the offence is ordinarily triable, is not a European British subject, the case shall be reported, by the committing Magistrate, for the orders of the High Court.**

Procedure when Sessions Judge is not a European British subject.

**78. Trials of European British subjects before the Court of Session shall be conducted according to the provisions of chapter XIX.**

Mode of conducting trials by Court of Session.

In trials with assessors not less than half the number of assessors, and in trials by jury not less than half the number of jurors shall be European British subjects.

**79. Any European British subject who is convicted by a competent Magistrate of any offence, may appeal either to the Court of Session or to the High Court.**

Appeal from conviction of such subject by Magistrate.

**80. Any European British subject who is convicted of any offence by any Court of Session, may appeal to the High Court.**

Appeal from conviction by Court of Session.

**81. Any European British subject who is detained in custody by any person, and who considers such detention unlawful, may apply to the High Court, which would have jurisdiction over him in respect of any offence committed by him at the place where he is detained, or to which he would be entitled to appeal from any conviction for any such offence, for an order directing the person detaining him to bring him before the said High Court to abide such further order as may be made by it. The High Court, if it thinks fit, may, before issuing such**

Right of European British subject under detention to apply for order to produce his person.

Procedure on such application.

order, inquire on affidavit or otherwise, into the grounds on which it is applied for, and grant or refuse such application; or it may issue the order in the first instance, and when the person applying for it is brought before it, it may make such further order in the case as it thinks fit after such inquiry as it thinks necessary.

The High Courts may issue such orders throughout the territories over which they have jurisdiction and over such other places as the Governor-General in Council may direct.

82. Neither the High Courts nor any Judge of such High Courts shall issue any writ of *habeas corpus*, *mainprise*, *de homine replegiando*, nor any other writ of the like nature beyond the Presidency towns.

83. When any person claims to be dealt with as a European British subject, he shall state the grounds of such claim to the Magistrate before whom he is brought for the purposes of the inquiry or trial; and such Magistrate shall on such statement decide whether he is or is not a European British subject, and shall deal with him accordingly; and if any such person is dissatisfied with such decision, the burden of proving that it was wrong shall be upon him. If the Magistrate decide that the accused person is not a European British subject, the trial shall proceed, but such decision shall form a ground of appeal.

84. If a European British subject does not claim to be dealt with as such before the Magistrate before whom he is tried or committed, he shall be held to have waived his privilege as such European British subject.

If the Magistrate has reason to believe that any person brought before him is a European British subject, it is his duty to ask him whether he is one or not.

85. If a person, who is not a European British subject, is dealt with as such and does not object, the proceedings shall be valid.

86. All High Courts shall deal with proceedings against European British subjects outside of the Presidency towns in the

manner in which they are empowered by this Act or by any other law in force for the time being to deal with the proceedings of Magistrates outside the Presidency towns; and not according to the law of England relating to the dealings of the superior Courts in England with the proceedings of Justices of the Peace in England.

The High Courts shall have the same powers with respect to the inquiries and charges against European British subjects as Courts of Session have with respect to inquiries and charges against other persons.

87. All Magistrates and Courts of Session, proceeding against European British subjects under this chapter, shall proceed under the provisions of this Act and not according to the law of England relating to Justices of the Peace; and all the provisions of this Act, not inconsistent with the provisions of this chapter, shall apply to such proceedings.

88. European British subjects sentenced to imprisonment shall be confined in such places as the Local Government may either specially or generally appoint.

## PART III.

### OF THE POLICE.

#### CHAPTER VIII.

OFFENCES OF WHICH INFORMATION MUST BE GIVEN TO THE POLICE, AND DUTY OF THE PUBLIC.

89. Every person aware of the commission of any offence punishable under sections one hundred and twenty-one, one hundred and twenty-one A, one hundred and twenty-two, one hundred and twenty-three, one hundred and twenty-four, one hundred and twenty-four A, one hundred and twenty-five, one hundred and twenty-six, one hundred and thirty, three hundred and two, three hundred and three, three hundred and four, three hundred and eighty-two, three hundred and ninety-two, three hundred and ninety-three, three hundred and ninety-four, three hundred and ninety-five, three hundred and ninety-six, three hundred

Power of High Courts as to issue of writs.

Procedure on claim of European British subject to be dealt with as such.

Failure to plead status a waiver.

Trial of person not a European British subject under this chapter.

Procedure of High Courts.

Proceedings against European British subjects to be regulated by this Act.

Place of confinement.

All persons to give information of certain offences.

and ninety-seven, three hundred and ninety-eight, three hundred and ninety-nine, four hundred and two, four hundred and thirty-five, four hundred and thirty-six, four hundred and forty-nine, four hundred and fifty, four hundred and fifty-six, four hundred and fifty-seven, four hundred and fifty-eight, four hundred and fifty-nine or four hundred and sixty of the Indian Penal Code, shall in the absence of reasonable excuse, the burthen of proving which shall lie upon such person, give information of the same to the nearest Police officer or Magistrate.

90. Every Village Headman, Village

Landholders and others bound to report certain matters.

Watchman, owner or occupier of land, or the agent of any such owner or occupier,

and every native officer employed in the collection of revenue or rent of land on the part of Government or the Court of Wards, is bound forthwith to communicate to the nearest Magistrate, or to the officer in charge of the nearest Police station, any information which he may obtain respecting—

(a.) the residence of any notorious receiver or vendor of stolen property at the village of which he is headman or watchman, or in which he owns or occupies land, or collects rent or revenue, as the case may be;

(b.) the resort to any place within the limits of such village of any person or persons known or reasonably suspected of being a thug or robber;

(c.) the commission or intention to commit suttee or other non-bailable offence at or near such village;

(d.) the occurrence of any sudden or unnatural death.

91. Every person is bound to assist a Magistrate or Police officer

All persons to assist Magistrate and Police in certain cases.

demanding his aid in the prevention of a breach of the peace,

or in the suppression of a riot or an affray, or in the taking of any other person whom such Magistrate or Police officer is authorized to arrest.

## CHAPTER IX.

### OF ARREST WITHOUT WARRANT.

92. A Police officer may, without orders from a Magistrate and without a warrant, arrest,—

When Police may arrest without warrant.

*Firstly*—Any person who in the sight of such Police officer commits a cognizable offence.

*Secondly*.—Any person against whom a reasonable complaint has been made or a reasonable suspicion exists of his having been concerned in any such offence.

*Thirdly*.—Any person against whom a hue and cry has been raised of his having been concerned in any such offence.

*Fourthly*.—Any person who has been proclaimed either under this Act, or in a District or Police Gazette or notification.

*Fifthly*—Any person found with property in his possession which may reasonably be suspected to be stolen property.

*Sixthly*.—Any person who obstructs a Police officer while in the execution of his duty, or who escapes from lawful custody, and

*Seventhly*.—Any person reasonably suspected of being a deserter from Her Majesty's Army or Her Majesty's Indian Army.

93. Any person known to have committed or suspected of having

Person charged refusing to give his name and residence.

committed an offence for which a Police officer is not

authorized to arrest without a warrant, and who refuses on demand of a Police officer to give his name and residence,

or gives a name or residence which there is reason to believe to be false,

may be detained by such Police officer for the purpose of ascertaining the name or residence of such person; and shall, within twenty-four hours, be forwarded to the Magistrate having jurisdiction, unless before that time his true name and residence are ascertained, in which case such person shall be forthwith released.

94. An officer in charge of a Police station may, without orders from a Magistrate and without a warrant, arrest or cause to be arrested any person, found lurking within the limits of such station, who has no ostensible means of subsistence, or who cannot give a satisfactory account of himself,

or any person who is a reputed robber, house-breaker, thief, receiver of stolen property knowing it to be stolen, or who is of notoriously bad livelihood.

95. Every Police officer shall prevent, and may interpose for the purpose of preventing, the commission of any cognizable offence.

96. Every Police officer receiving information of a design to commit any such offence, shall communicate such information to the Police officer to whom he is subordinate, and to any other officer whom it may concern to prevent or take cognizance of the commission of any such offence.

97. A Police officer, knowing of a design to commit any such offence, may arrest, without orders from a Magistrate and without a warrant, the person so designing, if the commission of the offence cannot be otherwise prevented.

98. A Police officer may, of his own authority, interpose for the prevention of any injury attempted to be committed in his view to any public property, moveable or immoveable, or to prevent the removal or injury of any public land-mark, or buoy or other mark used for navigation. If necessary such Police officer may detain the person, doing such injury according to the provisions of section ninety-three.

99. If there is reason to believe that any person, liable to arrest under this chapter without a warrant, of whom a Police officer is in search, has entered into or is within any house or place, it shall be the duty of the person, residing in or in charge of such house or place, on the demand of such Police officer, to allow ingress thereto, and all reasonable facilities for a search therein.

100. If ingress to such house or place cannot be obtained under section ninety-nine, the Police officer, authorized to make the arrest, shall take such precautions as may be necessary to prevent the escape of the person to be arrested and send immediate information to any Magistrate having jurisdiction.

If a warrant cannot be obtained without affording such person an opportunity of escape, and there is no person authorized to

enter without a warrant on the spot, the Police officer may make an entry into such house or place and search therein.

101. A Police officer making an arrest under this chapter shall, without unnecessary delay, take or send the person arrested before the Magistrate having jurisdiction in the case, or before the officer in charge of a Police station.

102. When any officer in charge of a Police-station requires any officer subordinate to him to arrest without a warrant (otherwise than in his presence) any person who may lawfully be arrested by such officer without a warrant, he shall deliver to the Police officer, required to make the arrest, an order in writing, specifying the person to be arrested, and the offence for which the arrest is to be made.

The provisions of sections ninety-one and one hundred and seventy-six to one hundred and eighty-two (both inclusive) shall apply to every order in writing issued under this section.

103. For the purpose of arresting any person accused of a cognizable offence, a Police officer may pursue any such person into the limits of the local jurisdiction of another Police officer, whether subordinate to the same Magistrate as himself, or to the Magistrate of any other District, and whether such place be in the same province or not.

104. Any person attending a Criminal Court, although not upon an arrest or summons on a complaint made, may be detained by such Court for the purpose of examination, for any offence which from the evidence he may appear to have committed, and may be proceeded against as though he had been arrested or summoned on a complaint made.

When the detention takes place in the course of an inquiry under chapter XV, or after a trial has been begun, the proceedings in respect of such person shall be commenced afresh and the witnesses re-heard.

## OF ARREST BY PRIVATE PERSONS.

105. Any private person may arrest any person who, in his view, commits a non-bailable and cognizable offence.

Arrest by private persons.

106. The master or mate of a British merchant ship may, either with or without the assistance of the Police, who are bound to aid if so required by such master or mate, arrest seamen or apprentices duly engaged, under the Statute 17 & 18 Vic., c. 104, or other law for the time being in force relating to merchant shipping, who refuse to join or desert from the vessel in which they contracted to serve.

Arrest of deserters from British ships.

Such arrest shall be made only at the request and on the responsibility of such master or mate, and he shall be required by the Police to accompany the arrested person, should he be apprehended, before the Magistrate having jurisdiction; and it shall be the duty of such master or mate to obey such requisition.

107. A private person making an arrest under this chapter shall forthwith make over the person arrested to a Police officer; and, in the absence of a Police officer, shall take such person to the nearest Police station. The Police shall deal with such person according to the provisions of section ninety-two or ninety-three, as the case may be, and shall not arrest or detain him unless he appears to be liable to arrest or detention under the section applicable.

How to proceed with person arrested.

108. When any offence is committed in the presence of a Magistrate, he may order any person to arrest the offender, and may thereupon commit him to custody, or, if the offence is bailable, may admit him to bail.

Offence committed in Magistrate's presence.

## CHAPTER X.

## POWERS OF THE POLICE TO INVESTIGATE.

109. An officer in charge of a Police station may, without order of a Magistrate, investigate any offence cognizable by the Police.

What offences Police officer may investigate.

110. A Police officer may not, without the order of a Magistrate of the first or second class, investigate an offence not cognizable by the Police.

What offences Police may not investigate.

A Magistrate of the first or second class may, as provided in sections twenty-four and twenty-six, order the Police to investigate; and, on receipt of an order to investigate a non-cognizable case, a Police officer may exercise the same powers in respect of the investigation as in a cognizable case.

111. Nothing in section one hundred and ten shall be held to interfere with the exercise of any powers vested in a Police officer by any special or local law, or with the performance of any duty which is imposed upon a Police officer by any such special or local law.

Saving of powers vested in Police by special or local law.

112. Every complaint, preferred to an officer in charge of a Police station, shall be reduced into writing, and shall be signed, sealed, or marked by the person making it; and the substance thereof shall be entered in a book to be kept by such officer in the form prescribed by the Local Government.

Complaint to Police to be in writing.

113. If a complaint is preferred to an officer in charge of a Police station of the commission within his local jurisdiction of an offence which is not cognizable by the Police, the Police officer shall enter the substance of it in the station diary, and shall refer the complainant to the Magistrate.

Complaint in non-cognizable cases.

114. If, from information or otherwise, an officer in charge of a Police station has reason to suspect the commission, within his local jurisdiction, of an offence cognizable by the Police, he shall send immediate intimation to the Magistrate having jurisdiction, and shall proceed in person or shall depute one of his subordinate officers to proceed to the spot to investigate the facts and circumstances of the case, and to take such measures as may be necessary for the discovery and apprehension of the offender.

Upon information, &c., Police officer in charge of station to proceed in person or depute a subordinate.

Police officers shall investigate offences committed within the local limits of their jurisdiction; but they may investigate offences committed outside of those limits in cases in

which a Magistrate might, under the provisions of chapter VI, inquire into an offence not committed within his district.

No such proceeding shall, at any stage, be called in question on the ground that such offence was not committed within such officer's local jurisdiction.

115 Such Magistrate, on receiving intimation of the commission of any such offence, may at once proceed, or depute any Magistrate subordinate to him to proceed, to hold a preliminary inquiry into or otherwise to dispose of such case in the manner provided in this Act.

116. Provided that, when any complaint is made against any person by name and the case is not of a serious nature, the officer in charge of a Police station need not proceed in person or depute a subordinate officer to make an investigation on the spot, unless such local investigation appears to be necessary.

117. Provided that, if it appear to the officer in charge of a Police station that there is no sufficient ground for entering on an investigation, or that the immediate apprehension of the accused is not necessary for the ends of justice, he shall not proceed in the case, but shall report the substance of the complaint or information for the orders of the Magistrate having jurisdiction.

Such report shall be submitted through such superior officer of Police as the Local Government shall, by general or special order, in that behalf appoint. Such superior officer may give such instructions to the officer in charge of the Police station as he deems fit, and shall, after recording such instructions on such report, transmit the papers without delay to the Magistrate having jurisdiction.

118. An officer in charge of a Police station or other officer making an investigation may, by an order in writing, require the attendance before himself of any person, being within the limits of his own or any adjoining station, who, from the statement of the complainant or otherwise, appears to be acquainted with the circumstances of any

case which such officer is investigating; and such person shall attend as required and shall answer all questions relating to such case put to him by such officer:

Provided that no person shall be bound to answer any questions tending to criminate himself.

119. An officer in charge of a Police station, or other Police officer making an investigation, may examine orally any person supposed to be acquainted with the facts and circumstances of the case, and may reduce into writing any statement made by the person so examined.

Such person shall be bound to answer all questions relating to such case put him by such officer other than questions criminating himself.

No statement so reduced into writing shall be signed by the person making it, nor shall it be treated as part of the record or used as evidence.

120. No Police officer or other person shall offer any inducement to an accused person by threat or promise or otherwise to make any disclosure or confession, whether such person is under arrest or not. But no Police officer or other person shall prevent the person arrested, by any caution or otherwise, from making any disclosure which he may be disposed to make of his own free will.

121. No Police officer shall record any statement or any admission or confession of guilt, which may be made before him by a person accused of any offence:

Provided that nothing in this section shall preclude a Police officer from reducing any such statement or admission or confession into writing for his own information or guidance, or from giving evidence of any dying declaration.

122. Any Magistrate may record any statement made to him by any person, or any confession made to him by any person, accused of an offence by any Police officer or other person. Such statements shall be recorded in the manner hereinafter prescribed for recording evidence, and such confessions shall be taken in the

Preliminary inquiry.

Where local investigation dispensed with.

Where Police officer in charge sees no sufficient ground for investigation.

Oral examination of witnesses by Police.

Police not to record statement or confession.

Powers of Magistrates to record statements and confessions.



manner provided in sections three hundred and forty-five and three hundred and forty-six, and shall, when recorded, be forwarded to the Magistrate by whom the case is inquired into or tried. No Magistrate shall record any such confession unless, upon inquiry, he has reason to believe that it was made voluntarily, and he shall make a memorandum at the foot of any such confession to the following effect:—

"I believe that this confession was voluntarily made."

(Sd.) A. B.,  
Magistrate.

123. If the person arrested appears from the information obtained to have committed the offence charged, and the offence is not bailable, the officer in charge of the Police station shall forward him under custody to the Magistrate having jurisdiction, and shall bind over the complainants, if any, and so many of the persons who appear to be acquainted with the circumstances of the case as may be necessary, to appear on a fixed day before such Magistrate, and to remain in attendance till otherwise directed.

When any subordinate Police officer has made any investigation under this chapter, he shall, if so required by the officer in charge of the Police station, submit a report of such investigation to him; or he may do so without such requisition; and the officer in charge of the Police station shall then proceed as if he had made the investigation himself.

124. No Police officer shall detain an accused person in custody for a longer period than, under all the circumstances of the case, is reasonable; and such period shall not, in the absence of the special order of a Magistrate, whether having jurisdiction to inquire into or try the case or not, exceed twenty-four hours, exclusive of the time necessary for the journey from the place of arrest to the Magistrate's Court.

If the investigation has not been completed within twenty-four hours and no such special order has been passed, and if there are grounds for believing that the accusation is well founded, the officer in charge of the

Police station shall forward the accused person to the Magistrate having jurisdiction, with a statement of the offence for which he has been arrested.

A Magistrate authorizing detention under this section shall record his reasons for so doing.

If such order be given by a Magistrate other than the Magistrate of the District or of a division of a District, he shall forward a copy of his order, with his reasons for making it, to the Magistrate to whom he is subordinate.

125. If it appears to the officer in charge of the Police station that

Procedure of Police in case of deficient evidence. there is not sufficient evidence or reasonable ground

of suspicion to justify the transmission of an accused person to the Magistrate, such officer shall release the accused person on bail, or on his own recognizance, to appear when required, and shall submit a report of the case for the orders of the Magistrate having jurisdiction. Such report shall be submitted through the superior officer of Police, mentioned in section one hundred and seventeen, who may, pending the orders of the Magistrate, give instructions as to the conduct of the investigation.

126. A Police officer, making an investigation under this chapter, shall day by day enter his proceedings.

proceedings in the investigation in a diary, setting forth the time at which the complaint or other information reached him, the time at which he began and closed his investigation, the place or places visited by him, and a statement of the circumstances ascertained by his investigation.

Any Criminal Court may send for the Police diaries of a case under inquiry or trial in such Court, and may use such diaries to aid it in such inquiry or trial. Neither the prisoner nor his agents shall be entitled to call for them, nor shall he or they be entitled to see them merely because they are referred to by the Court; but if they are used by the Police officer, who made them, to refresh his memory, or if the Court uses them for the purpose of contradicting such Police officer, the provisions of the law relating to documents used for such purposes shall apply to them.

127. The investigation shall be completed without unnecessary delay, and, as soon as it is completed, the Police officer making the same shall forward to the Magistrate having jurisdiction a report in the form prescribed by the Local Government, setting forth the names of the parties, the nature of the complaint, and the names of the persons who appear to be acquainted with the circumstances of the case, and shall also send to such Magistrate any weapon or article which it may be necessary to produce before him.

The Police officer shall state whether the accused person has been forwarded in custody, or has been released on bail or on his own recognizance.

If the accused person be detained in custody, the Police officer shall state the fact and the cause of his detention.

128. A person accused of any non-bailable offence shall not be admitted to bail, if there appear reasonable ground for believing that he has been guilty of the offence imputed to him.

But a person accused of any bailable offence shall be admitted to bail, if sufficient bail be tendered for his appearance before the Magistrate having jurisdiction in respect of the offence.

129. The bail to be taken under section one hundred and twenty-eight shall not be excessive; and the surety or sureties shall bind himself or themselves under a specific penalty to produce the accused person before the Magistrate on or before a fixed day, and from day to day, until otherwise directed, to answer the complaint.

130. Every complainant and other person acquainted with the facts and circumstances of the case, whose attendance before the Magistrate having jurisdiction is deemed necessary by the Police officer making the investigation, shall execute a recognizance in the Form (F) given in the second schedule hereto, or to the like effect, for appearance before the Magistrate having jurisdiction in respect of the offence on a fixed day.

If the Court of the Magistrate of the District or of a Magistrate of a division of a

District be inserted in the bond, it shall be held to include any Court to which such Magistrate may refer the case for inquiry or trial, provided notice be given to such complainant or witness.

Such day shall be the day whereon the accused person is to appear, if he has been admitted to bail, or the day on which he may be expected to arrive at the Court of the Magistrate, if he is to be forwarded in custody.

The officer in whose presence the recognizance is executed shall, after delivering to the complainant or one of the witnesses a duplicate thereof, send it with his report to the Magistrate having jurisdiction.

No Police officer shall, except as provided in the next following section, accompany the complainant or witnesses on his or their way to the Court of the Magistrate.

131. A Police officer shall not subject any complainant or witness to restraint or unnecessary inconvenience, nor require him to give any security for his appearance other than his own recognizance.

But if any complainant or witness refuses to attend, or to execute the recognizance directed in section one hundred and thirty, the officer in charge of a Police station may forward him under custody to the Magistrate having jurisdiction, who may detain him in custody until he executes such recognizance, or until the hearing is completed.

132. Officers in charge of Police stations shall report to the Magistrate of the District, or the Magistrate of the division of a District, the cases of all persons apprehended within the limits of their respective stations, or detained under section ninety-three, whether such persons have been admitted to bail or otherwise under whatever law such persons may have been arrested.

No person who has been apprehended by a Police officer shall be discharged, except on bail or on his own recognizance, or under the special order of a Magistrate.

133. The officer in charge of a Police station, on receiving notice or information of the unnatural or sudden death of any person, shall immediately give intimation thereof to the nearest Magistrate duly authorized, and shall proceed to the place where the body of such deceased person is, and there, in the presence of two or more respectable inhabitants of the neighbourhood, shall make an investigation, and report the apparent cause of death describing any mark of violence which may be found on the body, and stating in what manner or by what weapon or instrument such mark appears to have been inflicted.

The report shall be signed by such Police officer and other persons, or by so many of them as concur therein, and shall be forthwith forwarded to the Magistrate of the District or to the Magistrate of the division of a District.

When there is any doubt regarding the cause of death, the Police officer shall forward the body, with a view to its being examined, to the nearest Civil Surgeon or other medical officer appointed in this behalf by the Local Government, if the state of the weather and the distance admit of its being so forwarded without risk of putrefaction on the road.

In the presidencies of Madras and Bombay, the head of the village may also in like manner make the investigation and report to the nearest Magistrate duly authorized.

134. An officer in charge of a Police station may, by an order in writing, summon two or more persons as aforesaid for the purpose of the said investigation, and any other person who appears to be acquainted with the facts of the case. Any person so summoned shall be bound to attend and to answer all questions (other than questions which would criminate him.)

If the facts do not disclose a cognizable offence to which section one hundred and twenty-seven is applicable, such persons shall not be required by the Police officer to attend a Magistrate's Court.

135. The nearest Magistrate, duly authorized, may hold an inquiry into the cause of any such death, either instead of or in addition to the investigation held by the

Police officer; and if he does so, he shall have all the powers in conducting it which he would have in holding an inquiry into an offence, although no specific charge has been made against any person. The Magistrate holding such an inquiry shall record the evidence taken upon it in any of the manners hereinafter prescribed, according to the circumstances of the case.

136. The powers to be exercised by an officer in charge of a Police station under this chapter shall be exercised, in the event of his absence from the station house or of his illness, by the Police officer next in rank present at the Police station, above the rank of a constable.

137. Officers of Police superior in rank to officers in charge of a Police station may exercise the same powers throughout their local jurisdictions as may be exercised by officers in charge of Police stations within the limits of such stations.

138. For the purposes of this Act, an Assistant District Superintendent of Police may exercise any of the powers of a District Superintendent of Police, subject to the control of such District Superintendent of Police; or, in the absence of the District Superintendent of Police and the Assistant District Superintendent, the senior officer of Police on the spot may be directed by the Magistrate of the District to exercise the powers of a District Superintendent of Police.

## PART IV.

### OF PROCEEDINGS TO COMPEL APPEARANCE.

## CHAPTER XI.

### OF COMPLAINTS TO A MAGISTRATE.

139. Proceedings to compel the appearance before a Magistrate of persons accused or suspected of offences, who have not been arrested without warrant, may be by summons or by warrant.

When summons or warrant may be issued. 140. A summons or a warrant may be issued—

(a.) Upon a report by the Police under chapter X; but if the person complained of is already in custody, no complaint, summons or warrant is necessary.

(b.) Upon information or report by a Police officer as to a non-cognizable offence. Such information or report shall be regarded as a complaint.

(c.) Upon a complaint by a private person. Any person acquainted with the facts of a case may make a complaint.

(d.) Upon suspicion entertained by a Magistrate that an offence has been committed.

Who may entertain complaints. 141. The Magistrate of the District,

any Magistrate of a division of a District, or any Magistrate duly empowered in that behalf, in any case which he is competent to try or to commit for trial,

may entertain a complaint of an offence, whether preferred directly by the complainant, or on report of a Police officer, and may issue process in the manner hereinafter prescribed to compel the appearance of persons accused of such offences.

Any Magistrate to whom any case is duly referred, by any Magistrate duly empowered to make such reference, may dispose of such case.

A complaint or a Police report gives jurisdiction to a competent Magistrate to inquire into or try any offence covered

Effect of complaint or Police report.

by the facts complained of or reported, and also to try or commit for trial any person who, at the time when the complaint or report is made, or subsequently, appears to have committed the offence disclosed.

142. The Magistrate of the District, any Magistrate of a division of a District,

or any Magistrate duly empowered in that behalf, in any case in which he is competent to try or to commit for trial,

may, without any complaint, take cognizance of any offence which he suspects to have been committed, and may issue process in the manner hereinafter prescribed to compel the appearance before him of persons whom he suspects to have committed any such offence.

Nothing in this or in the last preceding section shall be held to authorize a Magistrate to take cognizance of a case without complaint, when the offence falls under Chapters XIX, XX or XXI of the Indian Penal Code; nor to entertain a complaint, or to take cognizance without complaint, of an offence without sanction, where such offence, by any law in force, may not be entertained without sanction.

143. The Magistrate of the District, Who may commit any Magistrate of a division of a District, any Magistrate of the first class, or, any Magistrate duly empowered in that behalf,

may commit any person to the Court of Session for any offence triable by such Court.

144. When, in order to the issuing of a summons or a warrant against any person for any offence, a complaint is made to a Magistrate, such Magistrate, if he is competent to receive such complaint, shall examine the complainant.

The examination shall be reduced into writing in a summary manner and signed by the complainant, and also by the Magistrate.

Where the complaint has been made by petition, and the Magistrate neglects to examine the complainant, the trial of the person accused shall not be set aside on this ground.

145. If the Magistrate be not competent to receive the complaint, he shall refer the complainant to a Magistrate having jurisdiction.

Procedure by Magistrate not empowered to hear complaint.

146. If the Magistrate sees cause to distrust the truth of a complaint, he may postpone the issuing of process for compelling the attendance of the person complained against, and may direct a previous inquiry or investigation to be made into the truth of the complaint, either by means of any officer subordinate to such Magistrate, or of a local Police officer, or in such other mode as he thinks fit, for the purpose of ascertaining the truth or falsehood of the complaint.

Postponement of issue of process.

If such inquiry or investigation is made by means of some person other than an officer exercising any of the powers of a Magistrate or a Police officer, such person shall exercise all the powers conferred by this Act on an officer in charge of a Police station, except that he shall have no power to make an arrest.

147. The Magistrate before whom such complaint is duly made may, if, after examining the complainant, there is in his judgment no sufficient ground for proceeding, dismiss the complaint.

The dismissal of a complaint shall not prevent subsequent proceedings.

If it appears to such Magistrate that there is sufficient ground for proceeding, he shall, if the case appears to be a summons case, issue his summons, or, if the case appears to be a warrant case, his warrant, for causing the accused person to appear before himself or some other Magistrate having jurisdiction.

148. When a complaint is made before a Magistrate having jurisdiction in the case, that any person has committed, or is suspected of having committed, any offence triable by such Magistrate and punishable with fine only, or with imprisonment for a period not exceeding six months, or with both, the Magistrate may issue his summons directed to such person requiring him to appear at a certain time and place before such Magistrate to answer to the complaint.

If the Magistrate believes that the accused person is about to abscond, he may, instead of issuing a summons, issue a warrant in the first instance for the arrest of such person.

149. When a complaint is made before a Magistrate, having jurisdiction in the case, that any person has committed, or is suspected of having committed, any offence triable by such Magistrate and punishable with imprisonment for a period exceeding six months,

or when a complaint is made before any Magistrate empowered to commit persons for trial before the Court of Session that any person has committed, or is suspected of having committed, any offence triable exclusively by the Court of Session, or which in the opinion of such Magistrate ought to be tried by the Court of Session,

such Magistrate may issue his warrant to arrest such person, or, if he thinks fit, his summons requiring him to appear to answer such complaint.

150. If the person served with a summons does not appear before the Magistrate at the time mentioned in such summons, and the Magistrate is satisfied that such summons was duly served in what the Magistrate deems a reasonable time before the time therein appointed or appearing to the same,

or if it appears to the Magistrate that, after due diligence, the summons could not be served according to the provisions of this Act,

the Magistrate may issue his warrant to apprehend the accused person.

151. In cases, of whatever nature, in which the Magistrate thinks fit to issue a summons, he may, if he sees sufficient cause, dispense with the personal attendance of the accused person and permit him to appear by an agent duly authorized to act in his behalf.

But it shall be in the discretion of such Magistrate at any stage of the proceedings to direct the personal attendance of the accused person.

## CHAPTER XII.

### OF THE SUMMONS.

152. Every summons issued by a Magistrate to an accused person shall be in writing, in duplicate, and shall be signed and sealed by such Magistrate, and shall be in the Form (A) given in the second schedule to this Act, or to the like effect.

153. A summons shall ordinarily be served through a Police officer; but the Magistrate issuing the summons may, if he see fit, direct it to be served by any other person.

154. The summons shall be served on the accused personally, in any district where he may be, by exhibiting one of the copies and delivering or tendering the other copy to him; or, in case the accused person cannot be found, the copy may be left for him with some adult male member of his

family residing with him, and the person summoned or the person with whom the copy is left shall sign a receipt therefore.

155. When the accused person cannot be found, and there is no adult male member of his family on whom the service can be made, the serving officer shall fix a copy of the summons on some conspicuous part of the house in which the accused person ordinarily resides.

156. A Magistrate may, notwithstanding the issue of such summons, either before the appearance of the accused person as required by such summons, or after default made by him so to appear, issue a warrant of arrest against such person.

157. The Magistrate of the District, a Magistrate of a division of a District, or a Magistrate of the first class duly authorized in that behalf and having local jurisdiction in such district or division of a district, may issue a summons or warrant for the apprehension of any person within such District or division of a District, in respect of any offence known or suspected to have been committed by such person in a different District or division of a District, or on the high seas, or in a foreign country, and for which, if committed within the local jurisdiction of such Magistrate, he might issue a summons or warrant.

158. The provisions relating to a summons, its issue and service, contained in this chapter, shall be applicable to every summons issued under this Act, except a summons to serve as a juror or assessor:

Provided that, when the person summoned is in the service of Government or of any Railway Company, the Court or Magistrate issuing the summons may send the summons to the head of the office in which the person summoned is employed; and such head shall thereupon cause the summons to be served on the person named therein.

### CHAPTER XIII.

#### OF THE WARRANT.

159. Every warrant issued by a Magistrate shall be in writing, and shall be signed and sealed by

such Magistrate, and shall be in the form (B) given in the second schedule to this Act, or to the like effect.

The warrant issued under this chapter remains in force until the person arrested is brought into the presence of the Magistrate who issued it and so long as he remains before such Magistrate. If the person arrested is to be remanded to custody, an order must be made under section one hundred and ninety-four, or a warrant issued under section three hundred and three.

160. It shall be in the discretion of a Magistrate, in issuing a warrant direct bail to be for the arrest of any person, to direct by endorsement on the warrant that, if such person be willing and ready to give bail, in a sum to be fixed by the Magistrate, for his appearance before the Magistrate on a specified day, [which sum and day shall be named in such endorsement] to answer the complaint, the officer to whom the warrant is directed shall accept such bail, and shall release from custody the person complained against.

If bail is given, the officer shall forward the bail-bond to the Magistrate.

161. A warrant shall ordinarily be directed to a Police officer, but the Magistrate issuing a warrant may, if immediate execution be necessary and no Police officer be immediately available, direct it to any other person.

162. The Magistrate of the District may direct a warrant or warrants to landholders, farmers or managers of land for the arrest of any escaped convict, proclaimed offender, or person who has been accused of a non-bailable offence, and who has eluded pursuit.

Such landholder or other person shall acknowledge the receipt of the warrant and shall be bound to execute it, should the person, for whose arrest it was issued, enter on or be in his estate, farm or land under his charge.

Should the person against whom such warrant is issued be arrested, he shall be made over to the nearest Police officer with the warrant, and such Police officer shall cause

such accused person to be carried before the Magistrate having jurisdiction, unless bail may be and is taken under section one hundred and sixty.

163. When a warrant is directed to a person other than a Police officer, any other person may aid in executing such warrant, if the person to whom the warrant is directed be near at hand and acting in the execution of the warrant.

Warrants directed to any person other than a Police officer.

164. A warrant may be directed to several persons, and, when so directed, may be executed by all, or by any one or more of such persons.

Warrant to several persons.

165. A warrant directed to a Police officer may also be executed by any other Police officer whose name is endorsed upon the warrant by the officer to whom the warrant is directed or endorsed.

Warrant directed to Police officer.

166. The Magistrate, by whom a warrant of arrest is issued, may attend personally for the purpose of seeing that the warrant is duly executed.

Magistrate issuing warrant may superintend its execution.

Any Magistrate may also at any time direct the arrest in his presence of any person for whose arrest he is competent to issue a warrant.

Arrest in presence of Magistrate.

167. A warrant, issued by a Magistrate, shall ordinarily be executed in the district in which it was issued.

Where warrant may be executed.

But if the person, against whom the warrant is issued, escapes, goes into, or is in any place out of the district in which the warrant was issued, the warrant may be executed in such place.

168. A Magistrate may direct a warrant to be executed outside his local jurisdiction, either after endorsement by a Magistrate within whose local jurisdiction it is to be executed, or without such endorsement.

Magistrate may issue warrant for execution in place outside his jurisdiction.

If the warrant is to be so endorsed it may be sent by post to the Magistrate within whose local jurisdiction it is to be executed and by whom it is to be endorsed.

If the warrant is not to be endorsed, it shall be entrusted to a Police officer, to be taken either to a Magistrate or to a Police

officer, not below the rank of an officer in charge of a station, in whose local jurisdiction the warrant is to be executed.

169. If a warrant is executed, whether with or without endorsement, outside the district in which it was issued, the person arrested shall, unless the Magistrate, who issued the warrant, be within twenty miles or be nearer than the Magistrate in whose local jurisdiction the arrest was made, or unless bail be taken under section one hundred and sixty, be carried before the Magistrate in whose local jurisdiction the arrest was made.

Procedure on arrest of person against whom warrant was issued.

170. A Magistrate or Police officer, to whom a warrant is directed for execution, shall execute the same or cause it to be executed, and any Magistrate, before whom a person is brought under the provisions of section one hundred and sixty-nine, shall, if the person arrested appears to be the person intended by the Magistrate who issued the warrant, direct his removal in custody to the Magistrate who issued the warrant,

or, if the offence be bailable, and the person arrested be ready and willing to give bail, shall take bail for his appearance before the Magistrate who issued the warrant, and the recognizance or bail-bond shall be forwarded to such Magistrate.

In this section the word Magistrate includes a Commissioner of Police and a Magistrate of Police in the Presidency towns.

171. If any person accused of an offence, not coming within section one hundred and forty-eight, absconds or conceals himself, so that, upon a warrant issued against him, he cannot be found, the Magistrate having jurisdiction shall, if he thinks, whether after taking evidence or not, that such person absconds or conceals himself for the purpose of avoiding the service of the warrant, issue a written proclamation, requiring him to appear to answer the complaint within a fixed period not less than thirty days.

Proclamation for person absconding.

Such proclamation shall be publicly read in some conspicuous place of the town or village in which the accused person usually resides, and shall be affixed on some conspicuous part of his ordinary place of abode, or on some conspicuous place of such town or village.



A copy of the proclamation shall also be affixed on some conspicuous part of such Magistrate's Court-house.

A statement by the Magistrate to the effect that the proclamation was duly made shall be conclusive evidence of due compliance with the law.

172. Such Magistrate may order the attachment of any property, movable or immovable, or both, belonging to the person so absconding or concealing himself.

Such order shall authorize the attachment of any property within the jurisdiction of the Magistrate of the District in whose district it is made; and it shall authorize the attachment of any property without the jurisdiction of the Magistrate of the District, when endorsed by the Magistrate of the District in which such property is situated.

The attachment under this section shall, if the property ordered to be attached, be land paying revenue to Government, be made through the Collector of the District in which the land is situate, and, in all other cases, by seizure under the order of the Magistrate having jurisdiction; or by the appointment of a manager and receiver; or by an order prohibiting the payment of rent to the absent person; as such Magistrate deems proper.

If the absent person does not appear within the time specified in the proclamation, the property under attachment shall be at the disposal of Government, but shall not be sold until the expiration of six months, unless it is of a perishable nature, or such Magistrate considers that the sale would be for the benefit of the owner.

173. When any person, whose property has come under the disposal of Government under section one hundred and seventy-two, appears or is found within two years after the attachment of the property, and proves to the satisfaction of the Court of Session or High Court trying him for the offence of which he was accused, or, if he is not tried in, or committed for trial for that offence to either of those Courts, to the satisfaction of the Magistrate of the District, that he did not abscond or conceal himself for the purpose of evading justice, such property, or, if the same has been sold, the proceeds thereof, shall be restored to him.

174. On the arrest of a person for whose apprehension a warrant has been issued under the provisions of section one hundred and fifty-seven, in respect of an offence known or suspected to have been committed in another District or division of a District, the Magistrate who issued the warrant shall, unless he is authorized to complete the inquiry himself, send the person arrested to the Magistrate within the limits of whose jurisdiction the offence is known or suspected to have been committed, or shall take bail for his appearance before such Magistrate, if the offence, of which such person is suspected, is bailable.

Magistrate's Procedure on arrest under his own warrant for offence committed out of his jurisdiction.

When the Magistrate, who issued the warrant, cannot satisfy himself as to the Magistrate of whom the person arrested should be sent, the case shall be reported for the orders of the High Court.

175. If the arrest was made under warrant issued under section one hundred and fifty-seven by a Magistrate other than the Magistrate of the District,

Procedure where such warrant issued by Subordinate Magistrate.

such Magistrate shall send the person arrested to the Magistrate of the District, unless the Magistrate, in whose jurisdiction the offence is suspected to have been committed, issues his warrant for the arrest of such person; in which case the person arrested shall be delivered to the Police officer executing such warrant, or shall be sent to the Magistrate by whom such warrant was issued.

If the offence, of which the person arrested is suspected, has been committed in the jurisdiction of another Subordinate Court of the same District, the Magistrate who issued the warrant under section one hundred and fifty-seven shall send the person arrested to the Magistrate of the division of the district in which the offence was committed.

176. A Police officer or other person, executing a warrant of arrest, shall notify the substance of the warrant to the person to be arrested, and, if required to do so, shall show the warrant to such person.

Notification of substance of warrant.

177. In making an arrest, the Police officer, or other person executing the warrant, shall actually touch or confine the body of the person to be arrested, unless there be a submission to the custody by word or action.

Warrant how executed.

178. If a person, against whom a warrant of arrest is issued, forcibly resists the endeavour to arrest him, the Police officer or other person executing the warrant may use all means necessary to effect the arrest.

Resisting endeavour to arrest.

179. If there is reason to believe that any person, against whom a warrant has been issued, has entered into, or is within, any house or place, it shall be the duty of any person residing in or in charge of such house or place, on demand of the Police officer or other person executing the warrant, to allow such Police officer or other person free ingress thereto, and to afford all reasonable facilities for a search therein.

Search of house entered by person against whom warrant issued.

180. The Police officer or other person authorized by warrant to arrest a person, may break open any outer or inner door or window of any house or place, whether that of the person accused or of any other person, in order to execute such warrant, if, after notification of his authority and purpose and demand of admittance duly made, he cannot otherwise obtain admittance.

Breaking of door or window.

181. If information be received that a person, accused of any offence for which a warrant may issue, is concealed in an apartment in the actual occupancy of a woman, who according to the customs of the country does not appear in public, the Police officer or other person employed to execute the warrant shall take such precautions as may be necessary to prevent the escape of the accused person.

Breaking open zenana.

If the accused person does not deliver himself up, the Police officer or other person authorized to execute the warrant may notify his authority and purpose, and demand admittance.

If after such notification and demand he cannot otherwise obtain admittance, he shall give notice to any woman as aforesaid in such

apartment, not being a person against whom a warrant has been issued, that she is at liberty to withdraw, and shall afford her every reasonable facility for withdrawing, and may then break open the apartment and execute the warrant.

182. The person arrested shall not be subjected to more restraint than is necessary to prevent his escape.

No unnecessary restraint.

183. The officer or other person executing the warrant shall, without unnecessary delay, bring the person arrested before the Magistrate before whom he is required by this Act to produce him.

Person arrested to be brought before Magistrate.

184. No Police officer or other person shall offer to the person arrested any inducement, by threat or promise or otherwise, to make any disclosure.

Inducements to disclosure or confession.

But no Police officer or other person shall prevent the person arrested, by any caution or otherwise, from making any disclosure which he may be disposed to make of his own free will.

185. The provisions relating to a warrant and its execution contained in this chapter, shall be applicable to every warrant of arrest issued under this Act.

Provisions as to warrant and its execution and issue applicable to all warrants of arrest.

## • PART V.

### OF INQUIRIES AND TRIALS.

#### CHAPTER XIV.

##### PRELIMINARY.

186. Every person charged before any Criminal Court with an offence may of right be defended by any barrister or attorney of a High Court, or by any pleader duly qualified under the provisions of Act No. XX of 1865, or any other law in force for the time being relating to pleaders.

Right of accused to be defended.

Any such person may, with the permission of the Court (but not otherwise), employ any Mukhtar or other person not being a barrister, attorney, or pleader, to assist him in his defence.

If an accused person, though not insane, cannot be made to understand the proceedings, the Court may proceed with the inquiry or trial; and if such inquiry results in a committal, or if such trial results in a conviction, the proceedings shall be forwarded to the High Court, with a report of the circumstances of the case, and the High Court shall pass thereon such order as to it seems fit.

187. The place in which the Court of a Magistrate is held for the trial of any offence, or for the purpose of conducting an inquiry into any case triable by a Court of Session or High Court, and also every Court of Session and every High Court shall be deemed an open and public Court, to which the public generally may have access, so far as the same can conveniently contain them.

But the Magistrate or presiding Judge may, if he thinks fit, order that, during the inquiry into or trial of any particular case, no person shall have access to, or be, or remain in, the room or building used by the Court without the consent or permission of the Court.

188. In the case of offences which may lawfully be compounded, injured persons may compound the offence out of Court, or in Court with the permission of the Court.

Such withdrawal from the prosecution shall have the effect of an acquittal of the accused person.

## CHAPTER XV.

### OF INQUIRY INTO CASES TRIABLE BY THE COURT OF SESSION OR HIGH COURT.

189. The following procedure shall be adopted in inquiries before Magistrates in cases triable by a Court of Session or High Court.

190. When the accused person appears or is brought before the Magistrate, or, if his personal attendance is dispensed with, when the Magistrate thinks fit, the Magistrate shall take the evidence of the complainant and of such persons as are

stated to have any knowledge of the facts which form the subject-matter of the accusation and the attendant circumstances.

191. The complainant and the witnesses for the prosecution shall be examined in the presence of the accused person, or of his agent, when his personal attendance is dispensed with and he appears by agent.

The accused person or his agent shall be permitted to examine and re-examine his own witnesses and to cross-examine the complainant and his witnesses.

192. The Magistrate may, at any stage of the proceedings, summon and examine any person whose evidence he considers essential to the inquiry, and re-call and re-examine any person already examined.

193. The Magistrate may, from time to time, at any stage of the inquiry and without previously warning the accused person, examine him, and put such questions to him as he considers necessary.

The accused person shall not render himself liable to punishment for refusal to answer such questions, or for giving false answers to them, but the Magistrate shall draw such inference as may to him seem just from such refusal.

*Explanation.*—The answer given by an accused person may be put in evidence against him, not only in the case under inquiry, but also in trials for any other offences which his replies may tend to show he has committed.

194. If, from the absence of a witness or from any other reasonable cause, it becomes necessary or advisable to defer the examination, or further examination, of witnesses, the Magistrate may, by a written order, from time to time adjourn the inquiry, and remand the accused person for such time as is deemed reasonable, not exceeding fifteen days:

Instead of detaining the accused person in custody during the period for which he is so remanded, the Magistrate may release him, upon his entering into a recognizance, with or without a surety or sureties, at the

discretion of such Magistrate, conditioned for his appearance before such Magistrate at the time and place appointed for the continuance of such examination.

*Explanation.*—After commencing the inquiry, if sufficient evidence has been obtained to raise a suspicion that the person accused may have committed an offence, and it appears likely that further evidence may be obtained by a remand, this is a reasonable ground for a remand.

195. When a Magistrate finds that there

are not sufficient grounds for committing the accused person to take his trial before the Court of Session or High Court, or for remanding him, he shall discharge him, unless it appears to the Magistrate that such person should be put on his trial before himself, in which case he shall proceed under chapters XVI, XVII or XVIII of this Act.

*Explanation I.*—The absence of the complainant, except when the offence may lawfully be compounded, shall not be deemed sufficient ground for a discharge, if there appear other evidence of a nature rendering a trial desirable.

*Explanation II.*—A discharge is not equivalent to an acquittal, and does not bar the revival of a prosecution for the same offence.

*Explanation III.*—An order of discharge cannot be made until the evidence of the witnesses named for the prosecution has been taken.

196. When evidence has been given be-

fore a Magistrate which appears to justify him in sending the accused person to take his trial for an offence which is triable exclusively by the Court of Session or High Court, or which, in the opinion of the Magistrate, is one which ought to be tried by such Court, the accused person shall be sent for trial by such Magistrate before the Court of Session or High Court as the case may be.

197. If such accused person (not being a European British subject)

is accused of having committed an offence conjointly with a European British subject who is about to be committed for trial, or to be tried, before the High Court on a similar charge,

and the evidence appears to justify the Magistrate in sending the accused person for trial,

he shall commit such accused person to take his trial before such High Court and not before a Court of Session; and such High Court shall have jurisdiction to try such person.

*Explanation.*—A commitment once made by a competent Magistrate can be quashed by the High Court only, and only on a point of law.

This explanation applies also to section one hundred and ninety-six.

198. When the Magistrate determines to

send the accused person before the Court of Session or High Court for trial, he shall, after the evidence has been recorded, make a written instrument under his hand and seal, declaring with what offence the accused person is charged, and shall direct him to be tried by such Court on such charge. He shall also record his reasons for committing such accused person.

A copy of such instrument shall be for-

warded with the record of the original inquiry to the Court of Session before which the accused person is to be tried; and a copy shall also be sent to the public prosecutor or other officer appointed to conduct the prosecution.

Any weapon or other article of property necessary to produce in evidence shall also be transmitted to the Court of Session.

When a commitment is made to the High Court, such instrument, record, and such weapon or other article shall be forwarded to the Clerk of the Crown or other officer appointed by the Court; and if any part of such record is not in English, a translation thereof in English shall be forwarded therewith.

199. As soon as the charge, on which the accused person is to be tried, has been prepared, it shall be read and explained to him; and a copy or translation thereof shall be furnished to him, if he so require.

200. The accused person shall be required

at once to give in, orally or in writing, a list of witnesses, whom he wishes to be summoned to give evidence on his trial before the Court of Session or High Court.

The Magistrate may, if he thinks proper, summon the persons so named to attend and give evidence at the inquiry; and if he does so, the commitment shall not be considered to have been made until such evidence has been taken.

It shall be in the discretion of the Magistrate, subject to the provisions of section three hundred and fifty-nine, to allow the accused person to give in any further list of witnesses at a subsequent time.

201. When the inquiry is concluded, the accused person shall, if he demands them at a reasonable time before the trial, be furnished with copies of the depositions. Such copies shall be made at his expense unless the Magistrate sees fit to give them free of cost.

202. When the accused person is committed to take his trial before the Court of Session or High Court, the Magistrate shall issue an order to the public prosecutor, Government Pleader or other person appointed by the Government to conduct prosecutions before the Court of Session or High Court, notifying such commitment, and stating the offence in the same form as the charge.

Nothing in this section shall preclude the Magistrate of the District in a case committed to the Court of Session, if he thinks fit, from appointing a person other than such Government Pleader or person to conduct the prosecution.

## CHAPTER XVI.

### OF THE TRIAL OF SUMMONS CASES BY MAGISTRATES.

203. The following procedure shall be observed in the trial of summons cases.

No formal charge need at any time be made against the accused person, and neither the complaint nor the summons shall

be regarded otherwise than as notice to the accused person of the facts to be inquired into. The Magistrate may convict the accused person of any offence (coming under this chapter) which, from the facts proved, he appears to have committed; whatever may be the nature of the complaint or summons.

No defect in the complaint or summons shall affect the validity of the proceedings unless it appears that the accused person was actually misled by such defect, and in considering whether or not he was so misled the Court shall have regard to the manner in which the accused person conducted his defence.

204. If, upon the day appointed, the accused person appears voluntarily in obedience to the summons in that behalf served upon him, or is brought before the Magistrate by virtue of a warrant or otherwise, it shall be at the discretion of the Magistrate to admit him to bail, or allow him to be at large upon his personal recognizance, as the Magistrate directs.

If the accused person cannot give bail, when required to do so, he shall be committed to custody.

205. If upon the day appointed for the appearance of the accused person, or any day subsequent thereto on which the case may be called on, the complainant does not appear, the Magistrate shall dismiss the complaint, unless for some reason he thinks proper to adjourn the hearing of the same to some other day. Such adjournment shall be made upon such terms as the Magistrate thinks fit.

206. On the appearance of both parties, on the day fixed for the trial, the substance of the complaint shall be stated to the accused person, and he shall be asked if he has any cause to show why he should not be convicted.

If the accused person admit the truth of the complaint, his admission shall be recorded, and if he shows no sufficient cause why he should not be convicted, the Magistrate may convict him accordingly of such offence (coming under this chapter) as he may appear to have committed.

207. If the accused person does not admit the truth of the complaint, the Magistrate shall proceed to hear the complainant and such witnesses as he produces in support of his complaint, and also to hear the accused person and such witnesses as he produces in his defence.

208. Before or during the hearing of any complaint, the Magistrate may, in order to secure the attendance of witnesses or for any other reason, adjourn, the hearing of the same to a day to be then appointed and stated in the presence and hearing of the party or parties.

If on the day to which such hearing or such further hearing has been so adjourned, the accused person does not appear, the Magistrate may issue his warrant for the arrest of such person.

If the complainant does not appear, the Magistrate may dismiss the complaint.

209. A Magistrate may dismiss the complaint as frivolous or vexatious, and may, in his discretion, by his order of dismissal, award that the complainant shall pay to the accused person such compensation, not exceeding fifty rupees, as to such Magistrate seems just and reasonable.

In such cases, if more persons than one are accused in the complaint, the Magistrate may in like manner award compensation not exceeding fifty rupees to each of them.

The sum so awarded shall be recoverable by distress and sale of the moveable property belonging to the complainant, which may be found within the jurisdiction of the Magistrate of the District; and such order shall authorize the distress and sale of any moveable property belonging to the complainant without the jurisdiction of the Magistrate of the District, when the order has been endorsed by the Magistrate of the District in which such property is situated, and, if the sum awarded cannot be realized by means of such distress, by imprisonment of the complainant in the civil jail, for any time not exceeding thirty days, unless such sum is sooner paid.

210. If a complainant, at any time before a final order is passed in any case under this chapter, satisfies the Magistrate that there are sufficient grounds for permitting him to withdraw his complaint, the Magistrate may permit him to withdraw it.

A complaint withdrawn under this section shall not again be entertained.

211. If the Magistrate, in any case tried under this chapter, finds the accused person not guilty, he shall record a judgment of acquittal.

If the accused person is convicted, the Magistrate shall pass sentence upon him according to law.

When the personal attendance of the accused person during the trial has been dispensed with, the sentence of the Magistrate, if the sentence be for fine only, may be pronounced in the presence of such accused person's agent, if he has been permitted to appear by agent; or the accused person may be required to attend to hear such sentence.

212. The dismissal of a complaint under this chapter shall operate in like manner as the acquittal of the accused person.

No complaint shall be dismissed under the provisions of this chapter except in so far as it refers to a summons case.

## CHAPTER XVII.

### OF THE TRIAL OF WARRANT CASES BY MAGISTRATES.

213. The following procedure shall be observed by Magistrates in the trial of warrant cases.

214. The provisions of sections one hundred and ninety to one hundred and ninety-four (both inclusive) shall apply to trials conducted under this chapter.

215. When the evidence of the complainant and of the witnesses for the prosecution, and such examination of the accused person as the Magistrate considers necessary, have been taken, the Magistrate, if he finds that no offence has been proved against the accused person, shall discharge him.

*Explanation I.*—The absence of the complainant, except where the offence may be lawfully compounded, shall not be deemed sufficient ground for a discharge, if there appears other evidence sufficient to substantiate the offence.

*Explanation II.*—A discharge is not equivalent to an acquittal and does not bar the revival of a prosecution for the same offence.

**Explanation III.**—An order of discharge cannot be passed until the evidence of the witnesses named for the prosecution has been taken.

216. If the Magistrate finds that an offence is apparently proved against the accused person, which such Magistrate is competent to try, and which, in his opinion, could be adequately punished by him, he shall prepare in writing a charge against the accused person.

**Explanation I.**—The omission to prepare a charge shall not invalidate the trial, if, in the opinion of the Court of appeal or revision, no failure of justice has been occasioned thereby.

**Explanation II.**—If the Court of appeal or revision thinks that a failure of justice has been occasioned by an omission to prepare a charge, it shall order the trial to be recommenced from the point at which the charge should have been drawn up.

217. The charge shall then be read and explained to the accused person, and he shall be asked whether he is guilty or has any defence to make.

218. If the accused person have any defence, he shall be called upon to enter upon the same, and to produce his witnesses if in attendance, and shall be allowed to recall and cross-examine the witnesses for the prosecution.

If the accused person puts in any written statement, the Magistrate may file it with the record, but shall not be bound to do so.

219. The Magistrate shall, subject to the provisions of section three hundred and sixty-two, summon any witness and examine any evidence that may be offered in behalf of the accused person, to answer or disprove the evidence against him, and may for this purpose, at his discretion, adjourn the trial from time to time, as may be necessary.

220. If the Magistrate finds the accused person not guilty, he shall record judgment of acquittal.

If the accused person is convicted, the Magistrate shall pass sentence upon him according to law.

**Explanation.**—If a charge is drawn up, the prisoner must either be acquitted or convicted. If no charge is drawn up, there can be no Judgment of acquittal or conviction, except in the case provided for in Explanation I to section two hundred and sixteen.

221. In any trial before a Magistrate, in which it may appear at any stage of the proceedings that from any cause the case is one which the Magistrate is not competent to try, or one which, in the opinion of such Magistrate, ought to be tried by the Court of Session or High Court, the Magistrate shall stop further proceedings under this chapter, and shall, when he either cannot or ought not to make the accused person over to an officer empowered under section thirty-six, commit the prisoner under the provisions hereinbefore contained. If such Magistrate is not empowered to commit he shall proceed under section forty-five.

## CHAPTER XVIII.

### OF SUMMARY TRIALS.

222. The Magistrate of the District may try the following offences in a summary way, and, on conviction of the offender, may pass such sentence as may be lawfully inflicted under section twenty of this Code:—

(1.) Offences referred to in section one hundred and forty-eight of this Code.

(2.) Offences relating to weights and measures under sections two hundred and sixty-four, two hundred and sixty-five, and two hundred and sixty-six of the Indian Penal Code.

(3.) Hurt, under section three hundred and twenty-three of the Indian Penal Code.

(4.) Theft, under section three hundred and seventy-nine of the Indian Penal Code, where the value of the property stolen does not exceed fifty rupees.

(5.) Theft, under section three hundred and eighty of the Indian Penal Code, where the value of the property stolen does not exceed fifty rupees.

(6.) Theft, under section three hundred and eighty-one of the Indian Penal Code, where the value of the property stolen does not exceed fifty rupees.



(7.) Receiving stolen property, under section four hundred and eleven of the Indian Penal Code.

(8.) Mischief, under section four hundred and twenty-seven of the Indian Penal Code.

(9.) House-trespass, under section four hundred and forty-eight of the Indian Penal Code.

(10.) Criminal intimidation, under sections five hundred and four and five hundred and six of the Indian Penal Code.

(11.) Abetment of, or attempt to commit when such attempt is an offence, any of the foregoing offences.

223. The Local Government may invest any Magistrate of the 1st class with power to try summarily all or any of the offences mentioned in section two hundred and twenty-two.

Power to invest Magistrates with power to try summarily.

224. The Local Government may invest any Bench of Magistrates invested with the powers of a Magistrate of the 1st class, with power to try summarily all or any of the offences mentioned in section two hundred and twenty-two.

Power to invest Bench of Magistrates invested with 1st class Magisterial powers.

225. The Local Government may invest any Bench of Magistrates invested with the powers of a Magistrate of the 2nd or 3rd class with power to try summarily all or any of the following offences :—

Power to invest Bench of Magistrates invested with less power.

Offences coming within sections two hundred and seventy-seven, two hundred and seventy-eight, two hundred and seventy-nine, two hundred and eighty-five, two hundred and eighty-six, two hundred and eighty-nine, two hundred and ninety, two hundred and ninety-two, two hundred and ninety-three, two hundred and ninety-four, three hundred and twenty-three, three hundred and thirty-four, three hundred and thirty-six, three hundred and forty-one, three hundred and fifty-two, four hundred and twenty-six, and four hundred and forty-seven of the Indian Penal Code; any offences against Municipal Acts, and the Conservancy Clauses of Police Acts punishable with fine or with imprisonment not exceeding one month.

226. In trials under this chapter the provisions of this Code in regard to summons cases shall be followed in respect of summons cases, and the procedure for warrant cases in respect of warrant cases, with the exceptions hereinafter provided.

Procedure for summons and warrant cases applicable with certain exceptions.

227. In cases where no appeal lies, the Magistrate or Bench of Magistrates need not record the evidence of the witnesses nor the reasons for passing the judgment, nor draw up a formal charge, but he or they shall enter in a register, to be kept for the purpose, the following particulars :—

Record in cases where there is no appeal.

- (a) The serial number;
- (b) The date of the commission of the offence;
- (c) The date of the report or complaint;
- (d) The name of the complainant;
- (e) The name, parentage and residence of the accused person;
- (f) The offence complained of or proved;
- (g) The prisoner's plea;
- (h) The finding, and, in the case of a conviction, a brief statement of the reasons therefor;
- (i) The sentence; and
- (j) The date on which the proceedings terminated.

228. If a Magistrate or Bench of Magistrates, acting under section two hundred and twenty-two, two hundred and twenty-three or two hundred and twenty-four, passes a sentence of more than three months' imprisonment, or of fine exceeding two hundred rupees;

Record in appealable cases.

or if a Bench of Magistrates, acting under section two hundred and twenty-five, convicts any person,

such Magistrate or Bench of Magistrates shall, before passing sentence, record a judgment embodying the substance of the evidence on which the conviction was had, and also the particulars mentioned in section two hundred and twenty-seven.

Such judgment shall be the only record in cases coming within this section.

229. Records made under section two hundred and twenty-seven and judgments recorded under section two hundred and twenty-eight shall be written by the

Language of judgment.

presiding officer, either in English or in the language of the district in which the trial was held, or, by direction of the Court to which such presiding officer is immediately subordinate, in the language of the presiding officer.

230. The Local Government may authorize any Bench of Magistrates, empowered to try offences summarily, to prepare the aforesaid record or judgment by means of an officer of such Court, and the record or judgment so prepared shall be signed by each member of such Bench present conducting the proceedings.

*Bench of Magistrates may be empowered to employ Clerk.*

## CHAPTER XIX.

### TRIAL BY COURT OF SESSION.

231. No Court of Session shall take cognizance of any offence as a Court of original criminal jurisdiction, unless the accused person has been committed by a Magistrate duly empowered in that behalf, except in the cases referred to in section four hundred and seventy-two.

232. All trials before the Court of Session shall be either by jury, or conducted with the aid of two or more assessors.

*Trials to be by jury or with assessors.*

233. The Local Government may order that the trial of all offences, or of any particular class of offences, before any Court of Session, shall be by jury, in any District, and such Local Government may from time to time revoke or alter such order.

Orders passed under this section shall be published in the official Gazette, and in such other manner as the Local Government from time to time directs.

*Explanation.*—If an offence triable with assessors is tried by a jury, the trial shall not on that ground merely be invalid. If an offence triable by a jury is tried with assessors, the trial shall not on that ground merely be invalid, unless objection be taken before the Court records its finding.

234. Criminal trials before the Court of Session in which a European (not being a European British subject) or an American,

*Jury for trial of Europeans or Americans.*

is the accused person, or one of the accused persons, shall be by jury.

In such case the jury, if such European or American desire it, shall consist of at least one-half of Europeans, whether European British subjects or not, or Americans, if such a jury can be procured:

Provided that, in any District in which the Local Government has not ordered that all trials before the Court of Session, or trials for all offences of the class within which the trial about to take place falls, shall be by jury, such European or American may elect to be tried without jury.

*Election to be tried without jury.*

235. In every trial before a Court of Session, the prosecution shall be conducted by the Public Prosecutor, Government Pleader or by some other officer specially empowered by the Magistrate of the District in that behalf.

*Trial before Court of Session to be conducted by Public Prosecutor, Government Pleader.*

236. In trials by jury before the Court of Session, the jury shall consist of such uneven number, not being less than three nor more than nine, as the Local Government, by any general order applicable to any particular District or to any particular classes of offences in that District, directs.

237. When the Court is ready to commence the trial, the accused person shall be brought before it, and the charge shall be read and explained to him, and he shall be asked whether he is guilty of the offence charged, or claims to be tried.

*Commencement of trial.*

If the accused person pleads guilty, the plea shall be recorded, and he may be convicted thereon.

*Plea of guilty.*

238. If the accused person refuses to, or does not plead, or if he claims to be tried, the Court shall proceed to choose jurors or assessors as hereinafter directed, and to try the case.

*Refusal to plead or claim to be tried.*

239. When the trial is to be with assessors, the assessors shall be chosen, as the Judge thinks fit, from the persons summoned to act as assessors.

*Assessors how chosen.*

240. When the trial is to be by jury, the jury shall be chosen by lot from the persons summoned to act as jurors.

*Jurors to be chosen by lot.*

241. In a trial by jury before the Court of Session of a person not being a European or an American, at least one-half of the jury, shall, if the accused person desire it, consist of persons who are neither Europeans nor Americans.

*Jury for trial of persons not Europeans or Americans.*

242. In any case before the Court of Session, in which a European or American is charged jointly with a person of any other race, such other person shall, if he desire it, be tried separately if the European or American claims to be tried by a jury consisting of at least one-half of Europeans and Americans.

*Jury when European or American charged jointly with one of another race.*

243. As each juror is chosen, his name shall be called aloud, and, upon his appearance, the accused person shall be asked if he objects to be tried by such juror.

*Names of jurors to be called.*

Objection may then be made to such juror by the accused person or by the Public Prosecutor, Government Pleader, or other person appointed to conduct the prosecution, and the grounds of objection shall be stated.

*Objections to jurors.*

Any objection made to a juror shall be decided by the Court, and the decision of the Court shall be final.

If an objection be allowed, the place of such jurors shall be supplied by any other juror attending in obedience to a summons; or, if there be no such juror present, then by any other person present in the Court whose name is on the list of jurors, or whom the Court considers a proper person to serve on the jury, provided no objection to such juror or other person be made and allowed.

244. Any objection taken to a juror on any of the following grounds, if made out to the satisfaction of the Court, shall be allowed:—

(1) any ground of disqualification within section four hundred and five;

(2) standing in the relation of husband, master or servant, landlord or tenant, to the person alleged to be injured or attempted to be injured by the offence charged, or to the person on whose complaint the prosecution was instituted, or to the person accused;

(3) being in the employment of any of such person;

(4) being plaintiff or defendant against any of such persons in any civil suit;

(5) having complained against, or having been accused by, any of such persons in any criminal prosecution;

(6) any circumstance which, in the judgment of the Court is likely to cause prejudice against, or favor to, any of such persons, or which renders such person improper as a juror.

245. The Judge shall not allow any person to serve on the jury, unless such person understands the language in which the evidence is given or interpreted.

*Juror to understand the language in which evidence is given or interpreted.*

246. When the jury has been completed, they shall appoint one of their number to be foreman.

*Foreman of jury.*

It shall be the duty of the foreman to preside in the debates of the jury, to deliver the verdict of the jury, and to ask any information from the Court that may be required by the jury.

If a majority of the jury do not agree in the appointment of a foreman, he shall be named by the Court.

247. The witnesses shall then be examined, cross-examined and re-examined according to the law for the time being relating to the examination of witnesses.

*Examination of witnesses.*

248. The examination of the accused person before the committing Magistrate shall be given in evidence at the trial.

*Examination of accused before Magistrate to be evidence.*

249. When a witness is produced before the Court of Session, or High Court, the evidence given by him before the committing Magistrate may be referred to by the Court if it was duly taken in the presence of the accused person, and the Court may, if it think fit, ground its judgment thereon, although the witnesses may at the trial make statements inconsistent therewith.

*Explanation.*—This section shall not authorize the Court to refer to the record of the evidence given by a witness who is absent, except in the cases in which such evidence may be referred to under the Indian Evidence Act or other law in force for the time being upon the subject of evidence.

250. The Court may, from time to time, at any stage of the trial, examine the accused person, and shall question him generally on the case after the witnesses for the prosecution have been examined, and before he is called on for his defence.

*Examination of accused.*

251. When the examination of the witnesses for the prosecution and the examination of the accused person is concluded, the accused person shall be asked whether he means to call witnesses. If he says that he does not, the prosecutor may sum up his case. The Court may then, if it thinks that there are no grounds for proceeding,

*Defence.*

in a case tried with assessors, record a finding, or, in a case tried by a jury, instruct the jury to return a verdict of acquittal.

If the Court considers that there are grounds for proceeding, it shall call on the accused person to state his grounds of defence and produce his witnesses.

The accused person or his Counsel or authorized Agent may then state the case for the defence, and may examine the witnesses, if any, produced for the defence, and at the conclusion of such examination may sum up his case.

252. If any evidence is adduced on behalf of the accused person; the officer conducting the prosecution shall be entitled to reply.

*Prosecutor's right of reply.*

253. Whenever, in the opinion of the Court, it is proper and convenient that the jury or assessors should view the place, in which the offence charged is said to have been committed, or any other place in which any other transaction material to the inquiry in the trial took place, an order shall be made to that effect, and the jury or assessors shall be conducted in a body, under the care of an officer of the Court, to such place which shall be shown to them by a person appointed by the Court.

*View by jury or assessors.*

Such officer shall not suffer any other person to speak to, or hold any communication with any of the jury or assessors; and they shall, when the view is finished, be immediately conducted back into Court.

254. If, in the course of a trial by jury at any time prior to the finding, any juror, from any sufficient cause, is prevented from attending through the trial, or if any juror absents himself, and it is not possible to enforce his attendance, a new juror shall be added, or the jury shall be discharged, and a new jury empannelled, and in either case the trial shall commence anew.

*Procedure when juror becomes unable to attend.*

255. When the case for the defence and the prosecutor's reply, if any, are concluded, the Court shall proceed—

*Assessors' opinion and charge to jury.*

in cases tried with assessors, to ask the assessors their opinion, and shall record it:

in cases tried by jury, to charge the jury, summing up the evidence for the prosecution and defence, and laying down the law by which the jury are to be guided.

A statement of the Judge's direction to the jury shall form part of the record.

256. It is the duty of the Judge to decide all questions of law, and especially all questions as to the relevancy of facts which it is proposed to prove; the admissibility of evidence or the propriety of questions asked by parties or their agents which may arise in the course of the trial; and, in his discretion, to prevent the production of inadmissible evidence, whether it is or is not objected to by the parties;

*Duty of Judge.*

to decide upon the meaning and construction of all documents given in evidence at the trial;

to decide upon all matters of fact which it may be necessary to prove in order to enable evidence of particular matters to be given;

to decide whether any question which arises is for himself or for the jury; and upon this point his decision shall be final.

The Judge may, if he thinks proper, in the course of his summing up, express to the jury his opinion upon any question of fact, or upon any question of mixed law and fact relevant to the proceeding.

#### Illustrations.

(a.) It is proposed to prove a statement made by a person not called as a witness under circumstances which render evidence of his statement admissible.

It is for the Judge and not for the jury to decide whether the existence of those circumstances has been proved.

(b.) It is proposed to give secondary evidence of a document, the original of which is alleged to have been lost or destroyed.

It is the duty of the Judge to decide whether the original has been lost or destroyed.

Duty of jury.

257. It is the duty of the jury—

(1) to decide which view of the facts is true, and then to return the verdict which under such view ought, according to the direction of the Judge, to be returned;

(2) to determine the meaning of all technical terms and words used in an unusual sense which it may be necessary to determine, whether such words occur in documents or not;

(3) to decide all questions declared by the Indian Penal Code, or any other law to be questions of fact;

(4) to decide whether general indefinite expressions do or do not apply to particular cases, unless such expressions refer to legal procedure or unless their meaning is ascertained by law, in either of which cases it is the duty of the Judge to decide their meaning.

#### Illustrations.

(a.) A is tried for the murder of B.

It is the duty of the Judge to explain to the jury the distinction between murder and culpable homicide, and to tell them under what views of the facts A ought to be convicted of murder, or of culpable homicide, or to be acquitted.

It is the duty of the jury to decide which view of the facts is true, and to return a verdict in accordance with the direction of the Judge, whether that direction is right or wrong, and whether they do or do not agree with it.

(b.) The question is whether a person entertained a reasonable belief on a particular point. Whether work was done with reasonable skill, or due diligence.

Each of these is a question for the jury.

258. If a juryman or assessor is personally acquainted with any relevant fact, it is his duty

When juryman or assessor may be examined.

to inform the Judge that such is the case, whereupon he may be examined, cross-examined, and re-examined in the same manner as any other witness.

259. If, in the course of a trial with the aid of assessors, at any time

Procedure when assessor is unable to attend.

prior to the finding, any assessor is, from any sufficient cause, prevented from attending through the trial, the trial shall proceed with the aid of the other assessor or assessors.

If all the assessors are prevented from attending through the trial, the proceedings shall be stayed, and a new trial shall be held with the aid of fresh assessors.

260. If a trial is adjourned, the jury or assessors shall be required to attend at the adjourned sitting, and at every subsequent sitting, until the conclusion of the trial.

Jury or assessors to attend at adjourned sitting.

261. In cases tried with assessors, the Court shall proceed to pass judgment of acquittal or conviction, having considered the opinions of the assessors, but not being bound to conform to them. If the accused person is convicted, the Court shall proceed to pass sentence on him according to law.

Cases tried with assessors.

262. The opinion of each assessor shall be given orally and shall be recorded in writing by the Court; but the decision is vested exclusively in the Judge.

Decision vested in Judge.

263. In cases tried by jury, the jury may retire to consider their verdict. It shall be the duty of an officer of the Court not to suffer any person to speak to or hold any communication with any member of such jury. When the jury have considered their verdict, the foreman shall inform the Court what is their verdict, or what is the verdict of a majority.

Cases tried by juries.

The jury shall return a verdict on all the charges on which the accused is tried, and the Court may ask them such questions as are necessary to ascertain what their verdict is. Such questions and the answers to them shall be recorded.

Verdict to be given on each charge.

Judge may question jury.

If the jury are not unanimous, the Judge may require them to retire for further consideration. After such a period as the Judge considers reasonable, the jury may deliver their verdict, although they are not unanimous.

Procedure where jury differ.

If the Court does not think it necessary to dissent from the verdict of a majority of the jurors, it shall give judgment accordingly. If the accused person is acquitted, the Court shall record judgment of acquittal. If the accused person is convicted, the Court shall proceed to pass sentence on him according to law.

If the Court disagrees with the verdict of the jurors or of a majority of such jurors, and considers it necessary for the ends of justice to do so, it may submit the case to the High Court, and may either remand the prisoner to custody or admit him to bail.

The High Court shall deal with the case so submitted as with an appeal, but it may convict the accused person on the facts, and if it does so, shall pass such sentence as might have been passed by the Court of Session.

264. The Court may, in its discretion, postpone the hearing of the case; and may, from time to time, adjourn the trial, if it considers that such adjournment is proper and will promote the ends of justice.

265. The same jury may try, or the same assessors may aid in the trial of, as many accused persons successively as to the Court seems fit.

## PART VI.

### APPEAL, REFERENCE, AND REVISION.

#### CHAPTER XX.

##### APPEALS.

266. Any person convicted on a trial held by any Magistrate of the 2nd or 3rd class, or any person sentenced by a competent Magistrate of the 2nd class under section forty-six, may appeal to the Magistrate of the District, or to a Magistrate of the 1st class who has been empowered by the Local Government to hear such appeals.

267. Any person required by a Magistrate of the 1st class to give security for good behaviour, under section five hundred and four or section five hundred and five, may appeal to the Magistrate of the District.

268. Any person convicted by any Civil, Criminal, or Revenue Court, under Chapter XXXII of this Act, may appeal to the Court to which decrees or orders made in such Court are ordinarily appealable, whatever may be the amount of the sentence

passed, subject to the rules provided in sections two hundred and seventy-five, two hundred and seventy-seven, two hundred and seventy-eight, two hundred and eighty, two hundred and eighty-one and two hundred and eighty-two.

An appeal from such conviction by a Small Cause Court may be made to the Court of Session within whose Sessions Division such Court is situate.

269. Any person convicted on a trial held by the Magistrate of the District or other Magistrate of the 1st class, or any person sentenced under section forty-six by a competent Magistrate of the 1st class, may appeal to the Court of Session.

The appellant shall in every case give notice of appeal to the Magistrate of the District, who shall, if necessary, instruct the Public prosecutor, Government Pleader or other officer empowered by Government or by the Magistrate of the District to prosecute the case.

270. Any person, convicted on a trial held by any officer invested with the power described in section thirty-six, may appeal to the High Court, if it appear from the sentence awarded that such officer was in such trial exercising such special powers. No appeal in such case shall lie to the Court of Session.

Any person convicted by an Assistant Sessions Judge may appeal to the Sessions Judge if the sentence appealed against does not exceed three years' imprisonment.

A sentence of an Assistant Sessions Judge confirmed, under section eighteen, by the Sessions Judge may be appealed to the High Court.

271. Any person convicted on a trial held by a Sessions Judge may appeal to the High Court.

The appeal may be on a matter of fact as well as on a matter of law.

If the conviction was in a trial by jury, the appeal shall be admissible on a matter of law only.

If such person be sentenced to death, the Sessions Court shall inquire whether he wishes to appeal, and if he signifies his intention to appeal, the Court shall inform

him that his appeal must be made within seven days, and shall delay the transmission of the reference, hereinafter required, for a reasonable time, not exceeding seven days, to allow of the appeal and reference being made at the same time.

When it appears that the execution of the sentence should not be delayed, the Sessions Court may record its reasons and forward the reference at once.

In no case requiring confirmation shall the High Court grant a longer delay than is herein allowed for the presentation of an appeal.

Where the reasons given by the Sessions Court for forwarding the reference at once are sufficient, the High Court shall decide the case in the absence of an appeal.

When, under the provisions of the law in force, judgments or orders made or passed by the High Court are made or passed, either in appeal, reference or revision, by a Court consisting of more than one Judge, any difference of opinion shall be settled by adding, when the High Court is composed of more than two Judges and the Court is equally divided, one or more Judges, and in such event the judgment or order shall follow the opinion of the majority of the Judges.

272. The Local Government may direct an appeal by the Public Prosecutor or other officer, specially or generally appointed in this behalf, from an original or appellate judgment of acquittal; but in no other case shall there be an appeal from a judgment of acquittal passed in any Criminal Court.

Such appeal shall lie to the High Court, and the rules of limitation shall not apply to appeals presented under this section.

The High Court may in any case so appealed direct a new trial by another Court, or may pass such judgment, sentence or order as may be warranted by law.

273. There shall be no appeal in cases in which a Court of Session, or the Magistrate of a District or other Magistrate of the 1st class, passes a sentence of imprisonment not exceeding one month only, or of fine not exceeding fifty rupees only, or of whipping only.

There shall be no appeal from a sentence of imprisonment passed by such Court or

officer in default of payment of fine when no substantive sentence of imprisonment has been passed.

Where an accused person has been convicted on his own plea, whether on a trial with assessors or by jury, there is no appeal, except as to the extent or legality of the sentence.

274. There shall be no appeal in cases tried summarily in which a Magistrate of the District, or a Magistrate or Bench of Magistrates invested with the powers of a Magistrate of the first class, empowered to act under section two hundred and twenty-two, two hundred and twenty-three or two hundred and twenty-four, passes a sentence of imprisonment not exceeding three months only, or of fine not exceeding two hundred rupees only, or of whipping only.

An appeal may be brought against any sentence referred to in section two hundred and seventy-three or two hundred and seventy-four, by which any two or more of the punishments therein mentioned are combined, but not against a sentence in which imprisonment is awarded in default of payment of fine and in addition thereto.

Nor against any sentence which would not otherwise be liable to appeal because the person convicted is ordered to find security to keep the peace.

The provisions of this and the last preceding section shall not apply to appeals from orders passed on European British subjects under section seventy-four or seventy-six.

275. Every petition of appeal shall be accompanied by a copy of the judgment or order appealed against.

276. A copy of the judgment or other order passed by any Criminal Court, and, in cases tried by jury, of the Judge's charge to the jury, shall be furnished without delay on the application of any person affected by such sentence or order.

Such copy shall be made at the expense of the person applying for it, unless he is in jail, or unless the Court, for some special reason, sees fit to grant such copy free of expense.



277. If the party appealing be in jail, he shall be at liberty to present his petition of appeal and the copy of the judgment or order appealed against to the Magistrate or other officer in charge of the jail, who shall thereupon forward the petition to the proper appellate authority.

278. The Appellate Court shall fix a reasonable time within which the appellant or his counsel or authorized agent may appear, and it may reject the appeal if, on a perusal of the petition of appeal and the copy of the judgment or order appealed against, and after hearing the appellant or his counsel or authorized agent, if he appears, it considers that there is no sufficient ground for questioning the correctness of the decision or for interfering with the sentence or order appealed against.

Before rejecting the appeal, the Court may call for and peruse all or any part of the proceedings of the lower Court, but shall not be bound to do so.

279. If the Appellate Court decide to hear the appeal, it shall cause notice to be given to the appellant, and, if the appeal be to the Session or High Court, shall also give notice to the Magistrate of the District, who shall inform, if necessary, the Public Prosecutor, Government, Pleader or other officer empowered by Government on that behalf, of the day on which such appeal will be heard.

280. The Appellate Court, after perusing the proceedings of the lower Court, and after hearing the appellant, his counsel or agent, if they appear, and the Public Prosecutor, Government Pleader or other officer empowered by Government or by the Magistrate of the District in that behalf, if he appears, may alter or reverse the finding and sentence or order of such Court, and may, if it see reason to do so, enhance any punishment that has been awarded:

Provided that if the appeal is from the sentence of a Magistrate of any class, the Appellate Court shall not inflict a greater punishment than might have been inflicted by a Magistrate of the first class.

281. In any case, in which an appeal is allowed, the Appellate Court may, pending the appeal, order that the sentence be suspended, and if the appellant be in confinement for an offence which is bailable, may order that he be released on bail.

The period during which the sentence is suspended shall be omitted in reckoning the completion of the punishment.

282. In any case, in which an appeal has been allowed, the Appellate Court, if it thinks further inquiry or additional evidence upon any point bearing upon the guilt or innocence of the appellant to be necessary, may either make such further inquiry and take such additional evidence itself or may direct such inquiry to be made and additional evidence to be taken.

If the Appellate Court takes further evidence and passes judgment and sentence, no fresh right of appeal arises in respect of such sentence.

When the evidence has not been taken before itself, the result of the further inquiry and the additional evidence shall be certified to the Appellate Court, and such Court shall thereupon proceed to dispose of the appeal.

Unless the Appellate Court otherwise directs, the presence of the appellant may be dispensed with when the further inquiry is made or evidence taken.

The provisions of this Act relating to summoning and enforcing the attendance of witnesses and their examination shall, so far as may be, apply to witnesses examined under this section.

283. No finding or sentence passed by a Court of competent jurisdiction shall be reversed or altered on appeal on account of any error or defect, either in the charge or in the proceedings on or before trial, or on account of the improper admission or rejection of any evidence, or by any misdirection in any charge to a jury, unless such error or defect has occasioned a failure of justice, either by affecting the due conduct of the prosecution, or by prejudicing the prisoner in his defence.

No irregularity in the proceedings up to trial is a sufficient ground for reversing any

judgment, sentence or order made or passed in a trial properly held.

In case the accused person has been sentenced to a larger amount of punishment than could have been awarded for the offence, which, in the judgment of the Appellate Court, is proved by the evidence, the Appellate Court may reduce the punishment within the limits prescribed by the Indian Penal Code or any law for the time being in force for such offence.

284. When any Court has convicted a person of an offence not triable by such Court, the Appellate Court shall annul the conviction and sentence of such Court, and direct the trial of the case by a Court of competent jurisdiction.

Procedure in case of conviction by Court not having jurisdiction.

285. Judgments, sentences and orders passed by an Appellate Court upon appeal shall be final, except in the cases provided for in sections two hundred and seventy-two and two hundred and ninety-seven.

Finality of orders on appeal.

286. No appeal shall lie from any judgment, sentence or order of a Criminal Court, except in the cases provided for by this Act or by any law for the time being in force.

Unless otherwise provided, no appeal to lie from judgment, order or sentence of Criminal Court.

#### Illustrations.

(a.) There is no appeal against an order refusing to grant compensation, or to grant an enhanced award.

(b.) There is no appeal against an order of a competent Magistrate dismissing a complaint.

(c.) There is no appeal against an order requiring a person to furnish security to keep the peace.

(d.) There is no appeal against an order requiring a person to furnish security to be of good behaviour, when such order is passed by the Magistrate of the District.

(e.) There is no appeal against an order passed under Chapter XXXIX; nor against a report by a jury under that chapter.

(f.) There is no appeal against an order of maintenance.

(g.) There is no appeal against an order placing a name on the jury list.

(h.) There is no appeal against an order by a Court of Session fining a juror or an assessor for non-attendance.

(i.) There is no appeal against the order of a competent Court refusing to order a commitment.

(j.) There is no appeal against an interlocutory order such as a claim to appear by agent.

(k.) There is no appeal from an order to pay compensation under section 22 of Act I of 1871 (*An Act to consolidate and amend the law relating to trespasses by cattle.*)

## CHAPTER XXI.

### REFERENCE.

287. If the Court of Session pass sentence of death, the proceedings shall be referred to the High Court, and the sentence shall not be executed without its confirmation by the High Court.

If the accused person is convicted of an offence punishable with death, and the Court sentences him to any punishment other than death, the Court shall, in its judgment, state the reason why sentence of death was not passed.

288. In any case so referred, whether tried with assessors or by jury, the High Court may either confirm the sentence, or pass any other sentence warranted by law, or may annul the conviction and order a new trial on the same or an amended charge, or may acquit the accused person.

Power of High Court to confirm sentence or annul conviction.

289. If the High Court think further inquiry or additional evidence upon any point bearing upon the guilt or innocence of the accused person to be necessary, it may direct such inquiry to be made, or such additional evidence to be taken.

Unless the Court of Reference otherwise directs, the presence of the convicted person may be dispensed with when the further inquiry is made or evidence taken, and neither under this section nor under section two hundred and eighty-two is such inquiry to be made or evidence taken in the presence of jurors or assessors.

The result of the further inquiry and the additional evidence shall be certified to the High Court, and the High Court shall thereupon proceed to pass judgment of acquittal, or to confirm the sentence, or to pass such sentence as it thinks fit.

290. In every case so referred to the High Court, the confirmation of the sentence, or any new sentence or order passed by the High Court, shall, when such High Court consists of two or more

Confirmation or new sentence to be signed by two judges.

Judges, be determined and signed by at least two Judges of such Court.

291. When a High Court of reference, revision, or appeal, consists of one of a single Judge, such Judge shall have all the powers conferred upon two or more Judges of the High Court by this chapter.

## CHAPTER XXII.

### SUPERINTENDENCE AND REVISION.

292. The High Court may make and issue general rules—

for keeping all books, entries and accounts to be kept in all Criminal Courts subordinate to it, and

for the preparation and transmission of any calendars or statements to be prepared and submitted by such Courts;

and may also frame forms (when not prescribed by this Act) for every proceeding in the said Courts for which it thinks that a form should be provided,

and from time to time may alter any such rule or form:

and, with the concurrence of the local Government, may make and issue general rules for regulating the practice and proceedings of all Criminal Courts subordinate to it, and, with the like sanction, may alter any such rule:

and a High Court not established by Royal Charter may, with the concurrence of the local Government, make and issue rules for regulating the practice and proceedings of that Court, and, with the like sanction, may alter any such rule:

Provided that such rules and forms be not inconsistent with the provisions of this Act, or of any other law in force for the time being.

All rules framed by the Court and all repeals and alterations thereof under this section, shall be published in the official Gazette.

293. All Subordinate Courts shall send to the High Court such periodical statements or calendars, of trials held by such Courts, as the High Court prescribes, exhibiting the offences charged, the offences of

which the accused persons are convicted, and the sentences or orders passed upon them.

294. The High Court may call for and examine the record of any case tried by any Subordinate Court for the purpose of satisfying itself as to the legality or propriety of any sentence or order passed, and as to the regularity of the proceedings of such Court.

295. Any Court of Session or Magistrate of the District may, at all times, call for and examine the record of any Court subordinate to such Court or Magistrate, for the purpose of satisfying itself or himself as to the legality of any sentence or order passed, and as to the regularity of the proceedings of such Subordinate Court.

For the purposes of this section, every Magistrate in a Sessions Division shall be deemed to be subordinate to the Sessions Judge of the Division.

296. If the Court of Session or Magistrate of the District is of opinion that the judgment or order is contrary to law, or that the punishment is too severe or is inadequate, such Court or Magistrate may report the proceedings for the orders of the High Court:

Provided that in session cases if a Court of Session or Magistrate of the District considers that a complaint has been improperly dismissed or that an accused person has been improperly discharged by a Subordinate Court, such Court or Magistrate may direct the accused person to be committed for trial.

297. If, in any case either called for by itself or reported for orders, or which comes to its knowledge, it appears to the High Court that there has been a material error in any judicial proceeding of any Court subordinate to it, it shall pass such judgment, sentence or order thereon as it thinks fit.

If it considers that an accused person has been improperly discharged, it may order him to be tried, or to be committed for trial;

If it considers that the charge has been inconveniently framed, and that the facts of the case show that the prisoner ought to have been convicted of an offence other than that of which he was convicted, it shall pass sentence for the offence of which he ought to have been convicted:

Provided that if the error in the charge appears materially to have misled and prejudiced the accused person in his defence, the High Court shall annul the conviction and remand the case to the Court below with an amended charge, and the Court below shall thereupon proceed as if it had itself amended such charge.

If the High Court considers that any person convicted by a Magistrate has committed an offence not triable by such Magistrate, it may annul the trial and order a new trial before a competent Court.

If it considers that the sentence passed on the accused person is one which cannot legally be passed for the offence of which the accused person has been convicted, or might have been legally convicted upon the facts of the case, it shall annul such sentence and pass a sentence in accordance with law.

If it considers that the sentence passed is too severe, it may pass any lesser sentence warranted by law; if it considers that the sentence is inadequate, it may pass a proper sentence.

The High Court may, whenever it thinks fit, order that the sentence, in any case coming before it as a Court of Revision, be suspended; and that any person imprisoned under such sentence be released on bail, if the offence for which such person has been imprisoned be bailable.

Except as provided in sections three hundred and twenty-eight and three hundred and ninety-eight, no Court, other than the High Court, shall alter any sentence or order of any Subordinate Court except upon appeal by the parties concerned.

No person has any right to be heard before any High Court, in the exercise of its powers of revision, either personally

or by agent, but the High Court may, if it thinks fit, hear such person either personally or by agent.

298. The High Court, the Court of Session or the Magistrate of the District may order any Subordinate Court to inquire into any complaint which has been dismissed under section one hundred and forty-seven.

299. Whenever a case is revised by the High Court under this chapter, it shall certify its decision or order to the Court in which the conviction was had or by which the order was passed; or if the conviction or order was passed by a Magistrate other than the Magistrate of the District, to the Magistrate of the District.

The Court or Magistrate to which the High Court certifies its order shall thereupon make such orders as are conformable to the decision of the High Court, and, if necessary, the record shall be amended in accordance therewith:

In cases revised by the High Court under this chapter, the High Court shall not alter or reverse the sentence or order of the Court below, except as herein provided, nor shall it reverse or set aside the verdict of a jury, unless it is of opinion that the jury was misdirected by the Judge. In that case it may set aside the verdict and direct a new trial, if it think fit to do so.

300. The provisions of section two hundred and eighty-three shall apply to revision orders under this chapter.

## PART VII.

### EXECUTION.

#### CHAPTER XXIII.

301. In cases referred by the Court of Session for the confirmation of a sentence of death by the High Court, the proper officer of the High Court shall without delay, after the order of confirmation or other order has been made by the High Court, send a copy of the order under the seal of the High Court, and attested with his official signature, to the Court of Session.

Such Court shall, if the sentence be confirmed or commuted, issue a warrant to the officer in charge of the jail in which the prisoner is confined, to cause the sentence or order to be carried into execution; or, in the case of any other orders, shall cause such orders to be carried into effect.

302. In cases tried by the Court of Session, the Court shall forward a copy of its finding and sentence to the Magistrate of the District in which the trial was held.

If the accused person is sentenced to transportation, imprisonment or whipping, the Court shall forthwith forward him, with a warrant for the execution of the sentence, to the officer in charge of the jail of the district in which the trial was held.

The warrant shall state the offence of which the accused person has been convicted and the period during which he is to be transported or imprisoned and the nature of the imprisonment or other punishment.

In cases tried by any Court inferior to a Court of Session, the Court passing the sentence shall forthwith forward the accused person, with a similar warrant for the execution of the sentence, to the officer in charge of the jail of the district in which the trial was held.

303. Every warrant for the commitment of a person to custody shall be in writing and signed and sealed by the Judge or Magistrate who issues it, and shall be directed to some jailor or other officer or person having authority to receive and keep prisoners, and shall be in the Form (C or D as the case may be) given in the second schedule to this Act or to the like effect.

304. The warrant of commitment shall be lodged with the jailor, if he be in the jail; and if he be not in the jail, with his deputy.

If the jailor has no deputy, the warrant may be lodged with any officer of the jail then being in the jail.

305. Upon the receipt of a warrant under section three hundred and one or three hundred and two, the officer in charge

of the jail shall cause the sentence to be executed, and shall return the warrant, when the sentence has been fully executed, to the Court from which it issued, with an endorsement under his signature, certifying the manner in which the sentence has been executed.

306. If a woman sentenced to death be found to be pregnant, the High Court shall order the execution of the sentence to be postponed, and may commute the sentence.

307. Whenever an offender is sentenced to pay a fine, the Court, which sentences him, may issue a warrant for the levy of the amount by distress and sale of any movable property belonging to the offender, whether or not the offence be punishable with fine only, and whether or not the sentence direct that, in default of payment of the fine, the offender shall suffer imprisonment.

Such warrant may be executed within the jurisdiction of the Court that issued it, and it shall authorize the distress and sale of any movable property belonging to the offender without the jurisdiction of the said Court, when endorsed by the Magistrate of the District in which such property is situated.

This section shall not apply to cases in which any special procedure is laid down by any special or local law, in force for the time being, for the recovery of any fine, but shall apply to cases in which no such procedure is laid down, and to all fines not levied when this Act comes into force, but which might have been levied under this section if it had been in force when they were imposed.

The warrant may be issued either by the Judge or Magistrate who passes the sentence or by his successor in office.

308. Whenever a Criminal Court imposes a fine under any law in force for the time being, or confirms in appeal or revision a sentence of such fine, or a sentence of which such fine forms a part, the Court may order the whole or any part of the fine to be paid in compensation,

Court of Session to send copy of finding and sentence to District Magistrate.

Warrant of execution.

Procedure after sentence passed by Court inferior to Session Court.

Form and direction of warrant of commitment.

Warrant with whom to be lodged.

Execution of sentence under section 301 or 302.

Postponement of capital sentence on pregnant woman.

Levy of fine.

Section to what cases applicable.

Who may issue warrant.

Payment of fine in compensation.

(1) for expenses properly incurred in the prosecution,

(2) for the offence complained of, where such offence can, in the opinion of the Court, be compensated by money.

Such payment shall be made, as the Court thinks fit, to or for the benefit of the complainant, or the person injured, or both.

If the fine be awarded by a Court whose decision is subject to appeal or revision, the amount awarded shall not be paid until the period prescribed for presentation of the appeal has elapsed, or, if an appeal be presented, till after the decision of the appeal.

In any subsequent civil proceedings relating to the same matter, the Court shall take into account any sum which may have been awarded under this section.

309. In every case punishable, under any law in force for the time

Imprisonment in default of payment of fine.

being, with imprisonment as well as fine, in which the offender is sentenced to a fine, whether with or without imprisonment, the Criminal Courts shall be guided by the provisions of sections sixty-four and sixty-five of the Indian Penal Code in awarding the period of imprisonment in default of payment of the fine :

Provided that, in no case decided by a

Proviso as to cases decided by a Magistrate.

Magistrate, where imprisonment shall have been awarded as part of the substantive sentence, shall the period of imprisonment, awarded in default or payment of the fine, exceed one-fourth of the period of imprisonment which such Magistrate is competent to inflict as punishment for the offence otherwise than as imprisonment in default of payment of the fine.

Where a person is sentenced to fine only, the Magistrate may award such term of imprisonment in default of payment of fine as is allowed by law, provided the amount does not exceed the Magistrate's powers under this Act.

310. When the punishment of whipping

Whipping, if awarded in addition to imprisonment, when to be inflicted.

is awarded in addition to imprisonment, by a Court whose sentence is open to revision by a superior Court, the whipping shall not be inflicted until fifteen days from the date of such sentence, or, if an appeal be made within that time, until the sentence is confirmed by the superior Court: but the whipping shall be inflicted

immediately on the expiry of the fifteen days, or, in case of an appeal, immediately on the receipt of the order of the Appellate Court confirming the sentence.

311. In the case of person of or over

Mode of inflicting the punishment. sixteen years of age, the punishment of whipping,

shall be inflicted with such instrument, in such mode and on such part of the person as the Local Government directs; and, in the case of a person under sixteen years of age, it shall be inflicted in the way of school discipline with a light ratan.

In no case, if the cat-of-nine-tails be the instrument employed, shall the punishment of whipping exceed one hundred and fifty lashes, or, if the ratan be employed, shall the punishment exceed thirty stripes.

The punishment shall be inflicted in the presence of a Magistrate, and also, unless the Court which passed the sentence otherwise orders, in the presence of a Medical Officer.

312. No sentence of whipping shall be

Punishment not to be inflicted if offender not in fit state of health. carried into execution unless a Medical Officer, if present, certifies, or, if there is not a

Medical Officer present, unless it appears to the Magistrate present, that the offender is in a fit state of health to undergo the punishment.

If during the execution of a sentence of

Stay of execution. whipping, a Medical Officer certifies, or it appears to the Magistrate present, that the offender is not in a fit state of health to undergo the remainder of the punishment, the whipping shall be finally stopped.

Not to be executed by instalments. No sentence of whipping shall be executed by instalments.

313. In any case in which, under section

Procedure if punishment cannot be inflicted under the last section. three hundred and twelve, a sentence of whipping is, wholly or partially,

prevented from being carried into execution, the offender shall be kept in custody till the Court which passed the sentence can revise it; and the said Court may, at its discretion, either order the discharge of such offender, or sentence him, in lieu of whipping, or in lieu of so much of the sentence of whipping as was not was carried out, to imprisonment for any period, which

may be in addition to any other punishment to which he may have been sentenced for the same offence:

Provided that the whole period of imprisonment to which such offender is sentenced shall not exceed that to which he is liable by law, or that which the said Court is competent to award.

314. When a person is convicted at one trial of two or more offences punishable under the same or different sections of any law for the time being in force, the Court may sentence him, for the offences of which he has been convicted, to the several penalties prescribed by such enactment or enactments, which such Court is competent to inflict; such penalties, when consisting of imprisonment or transportation, to commence the one after the expiration of the other.

It shall not be necessary for the Court, by reason only of the aggregate punishment for the several offences being in excess of the punishment which it is competent to inflict on conviction of a single offence, to send the offender for trial before a higher Court:

Provided that in no case shall such person be sentenced to imprisonment for a longer period than fourteen years:

Provided also that, if the case be tried by a Magistrate, (other than a Magistrate acting under section thirty-six) the punishment shall not in the aggregate exceed twice the amount of punishment which he is by his ordinary jurisdiction competent to inflict.

315. Whoever, having been convicted of an offence punishable under chapter XII or chapter XVII of the Indian Penal Code with imprisonment for a term of three years or upwards, is again accused of any offence punishable under either of those chapters with imprisonment for a term of three years or upwards, shall ordinarily, if the Magistrate considers him an habitual offender, be committed to the Court of Session:

Provided that, in districts in which the Magistrate of the District has been invested with powers under section thirty-six, the accused

person may be placed on his trial before such Magistrate of the District.

316. When sentence is passed on an escaped convict for such escape or for any other offence, the Court may direct the sentence to take effect immediately, or after such convict has suffered imprisonment or transportation, as the case may be, for a further period, equal to that which remained unexpired of his former sentence at the time of his escape.

317. When sentence is passed on a person already under sentence of imprisonment or transportation, and the sentence is for imprisonment or transportation, the Court shall direct that such imprisonment or transportation shall commence at the expiration of the imprisonment or transportation to which such person has been previously sentenced, or, if he is undergoing a sentence of imprisonment, and the sentence, on such subsequent conviction, be for transportation, the Court may direct that the sentence shall commence immediately, or at the expiration of the imprisonment to which such person has been previously sentenced:

Provided that nothing in this section shall be held to excuse such person from any part of the punishment to which he is liable upon such former or subsequent conviction.

318. When any person, under the age of sixteen years, is sentenced by any Criminal Court to imprisonment for any offence, such Court may direct that such offender, instead of being imprisoned in the criminal jail, shall be confined in any reformatory established by the Local Government as a fit place for confinement, in which there are means of suitable discipline and of training in some branch of useful industry, or which is kept by a person willing to obey such rules as the Government prescribes with regard to the discipline and training of persons confined therein.

All persons confined under this section shall be subject to the rules so prescribed by Government.



### 319. The Governor General of India in Council may, from time to

Governor General in Council to appoint places to which persons sentenced to transportation may be sent.

Local Government to direct removal of such persons to places appointed.

time, appoint a place or places within British India to which persons sentenced to transportation shall be sent: the Local Government, or some officer duly authorized by such Government, shall give orders for the removal of such persons to the place or places so appointed; and no sentence of transportation shall specify the place to which the person sentenced is to be transported.

320. When sentence of transportation is passed on a person already undergoing transportation under a sentence previously passed for another offence, it shall not be necessary for the Local Government to order his removal from the place in which he is so undergoing transportation.

321. When any person is sentenced to death, the sentence shall direct that he be hanged by the neck till he is dead.

322. When any person has been sentenced to punishment for an offence, the Governor General of India in Council, or the Local Government, may, at any time, without conditions, or upon any conditions which the person sentenced accepts, remit the whole or any part of the punishment to which he has been sentenced.

If the person, to whom a pardon has been given, fails to fulfil the conditions prescribed by the Governor General of India in Council, or the Local Government, the Governor General of India in Council, or the Local Government, as the case may be, may withdraw such pardon, whereupon such person shall be remanded to undergo the unexpired portion of his sentence.

The Governor General of India in Council, or the Local Government, may also, without the consent of the person sentenced, in substitution for the sentence passed according to law, commute any one of the following sentences for any other mentioned after it—

death, transportation, penal servitude, imprisonment.

## PART VIII.

### EVIDENCE.

#### CHAPTER XXIV.

#### SPECIAL RULES OF EVIDENCE IN CRIMINAL CASES.

323. The examination of a Civil Surgeon or other medical witness, taken and duly attested by a Magistrate, may be given in evidence in any criminal trial although the person examined is not called as a witness.

Evidence of medical witness.

The Court may summon such Civil Surgeon or other medical witness, if it sees sufficient cause for doing so.

Court may summon medical witness.

324. If an accused person admits the commission of an offence before a Court competent to try him for such offence, such Court may convict him on his own admission.

Accused may be convicted on his own plea.

325. Any document purporting to be a report from the Chemical Examiner or Assistant Chemical Examiner to Government upon any matter or thing duly submitted to him for examination or analysis and report, in the course of any criminal trial, or in any preliminary inquiry relating thereto, may, if it bears his signature, be used as evidence in any criminal trial.

Report of Chemical Examiner.

The Court may presume that the signature of any such document is genuine and that the person signing it held the office which he professed to hold at the time when he signed it.

Genuineness of Signature may be presumed.

326. Where a previous conviction or acquittal is to be proved against an accused person, application shall be made to the officer in whose custody the records of such trial may be. It shall not be necessary to produce the record of the conviction or acquittal of such accused person, or a copy thereof, but an extract may be produced in proof of such conviction or acquittal if certified, under the hand of the Clerk of the Court or other officer having the custody of the records of the Court in which such conviction or acquittal was had, or by the

Previous conviction or acquittal how proved.

Deputy of such Clerk or officer, to be a copy of the charge, finding and sentence, as the case may be.

327. If an accused person absconded, and after due pursuit cannot be arrested, any Court, competent to try or to commit such accused person for trial for the offence complained of, may, in his absence, record the statements of the persons acquainted with the facts; and such depositions may, on the arrest of such person, be put in on his trial for such offence, if it is not practicable to procure the attendance of such witnesses.

328. Whenever any Magistrate, after having heard part of the evidence in a case, ceases to exercise jurisdiction in such case and is succeeded by another Magistrate who has and who exercises jurisdiction in such case, such last-named Magistrate may decide the case on the evidence partly recorded by his predecessor and partly recorded by himself, or he may re-summon the witnesses and commence afresh:

Provided that the accused person may, when the second Magistrate commences his proceedings, demand that the witnesses shall be re-summoned and reheard, in which case the trial shall be commenced afresh:

Provided also that any Court of appeal or revision, before which the case may be brought,

or, in cases tried by Magistrates subordinate to the Magistrate of the District, the Magistrate of the District, without appeal, may set aside any conviction, passed on evidence not wholly recorded by the Magistrate before whom the conviction was had, if such Court or Magistrate is of opinion that the accused person has been materially prejudiced thereby; and may order a new trial.

329. Whenever, from any cause, a Magistrate making an inquiry, under chapter XV of this Act, is unable to complete the proceedings himself, any other Magistrate having jurisdiction to inquire and to commit, may complete the case and proceed as if he had recorded all the evidence himself.

330. Whenever it appears that the attendance of a witness cannot be procured without an amount of delay, expense or inconvenience which under the circumstances of the case would be unreasonable, it shall be competent to a Court of Session or to a High Court to dispense with the personal attendance of such witness.

Such Court of Session or High Court may direct a commission to the Magistrate of the District, or to a Magistrate of the 1st class, in whose jurisdiction such witness may be. The Magistrate to whom the commission is directed shall proceed to the place where such witness is, or shall summon such witness before himself. Such Magistrate shall take the evidence of such witness in the same manner, and shall have for this purpose and may exercise the same powers, as in trials of warrant cases.

The prosecutor and the accused person may forward interrogatories to which the officer to whom the commission is directed shall cause a return to be made, or the prosecutor may appear personally before the Magistrate to whom the commission is directed, or the prosecutor or accused person may so appear by authorized agent.

Whenever, in the course of a trial before a Magistrate, it shall appear that a commission ought to be issued for the examination of a witness whose evidence is necessary in such trial, such Magistrate shall apply to the Court of Session, to which he is subordinate, stating the reasons for the application; and such Court may either issue a commission in the manner hereinbefore provided, or may reject the application.

## CHAPTER XXV.

### EVIDENCE HOW TAKEN.

331. In all Criminal Courts, complainants and witnesses shall be examined upon oath or affirmation, or otherwise according to the provisions of the law for the time being in force in relation to the examination of witnesses.

THE 3RD AUGUST 1872.

*Present:*

The Hon'ble H. V. BAYLEY, } ... Judges.  
 „ D. N. MITTER, }

CASE NO. 289 OF 1872.

*Special Appeals from a Decision passed by the Subordinate Judge of Rajshahye, dated 30th September 1871, confirming a decree of the Moonsiff of Sherajgunge, dated 9th March 1871.*

Tripooora Soondary and } (Defts.) Appellants,  
 another ... }

*versus*

Durbomoye Chowdrini, (Plff.) Respondent.

*For Appellant.*—Baboos Sreenath Dass,  
 Moheney Mohun Roy and Kishen  
 Doyal Roy.

*For Respondent.*—Baboos Doorga Mohun Dass  
 and Romesh Chunder Mitter.

CASE NO. 290 OF 1872.

Tripooora Soondary } (Defts.) Appellant,  
 Chowdrini ... }

*versus*

Kally Chunder Roy } (Plffs.) Respondents.  
 Chowdry and others }

*For Appellant.*—Baboos Sreenath Dass,  
 Mohiney Mohun Roy and Kishen  
 Doyal Roy.

*For Respondent.*—Baboo Doorga Mohun Dass.

A private butwara is binding as between the parties to that butwara and persons claiming title under them, although it may not be binding against the Government or Agent, a purchaser at a sale for arrear of Government Revenue.

THE facts of this case are fully set forth in the judgment, it is useless therefore to recapitulate them here.

MITTER, J.—(Bayley, J., concurring.)—The plaintiffs in these two cases representing themselves to be the owners of a four gundas one cowree share of a certain Government revenue-paying mehal registered as mehal 28 in the Towzee of the Mymensingh Collectorate, brought a suit against the defendants their co-sharers in the said mehal for the declaration of their right to have a butwara of the share claimed by them made by the Collector under the provisions of Regulation XIX of 1814.

In that suit the answer of the defendants was, that the mehal in question had been divided between the different shareholders under a private partition effected between the predecessors of the plaintiffs and those of the defendants long prior to the decennial settlement, and that as each shareholder in the mehal had been since that time enjoying exclusive possession of the separate plots allowed to his share under the partition, the plaintiffs could not justly ask the Court to order a re-division of the estate in supersession of the long existing arrangement.

All the Courts which had to deal with that suit found or admitted as a matter-of-fact that the lands of the mehal above referred to had been actually divided between the different shareholders long previous to the institution of that case, but they gave a decree to the plaintiffs declaring their right to have a fresh butwara made by the Collector upon the ground that the plaintiffs were not bound to abide by a mere private partition.

In order to carry out this decree a precept was issued to the Collector directing that officer to make a butwara under the provisions of Regulation XIX of 1814, but the Revenue authorities refused to carry out the order declaring that no butwara could be made as the lands of Mehal 28 were intermingled with those of other estates, bearing distinct numbers in the Collector's Towzee.

The plaintiffs have now brought these suits for the declaration of their respective rights to collect rents from each and every one of the occupants of the lands of the mehal.

The answer of the defendants was that the suit was not maintainable, as there was no cause of action disclosed in the plaint, that the plaintiff's right to various portions of the lands in dispute was, barred by the law of limitation and that it was not competent to the plaintiffs to go beyond the private partition which was made with the full concurrence of their predecessors in title, and to ask the Court to declare them, entitled to a joint, undivided share of each plot of land in the mehal.

The first Court found as a fact that the defendant's allegation with reference to the private partition was good and well founded, but nevertheless it gave a decree to the plaintiff's holding that the judgment in the

previous suit had settled finally and conclusively that they (the plaintiffs) were entitled to the joint undivided shares respectively claimed by them.

This judgment having been upheld by the Subordinate Judge, the defendant's appeal to us specially urging among other grounds that upon the finding of the first Court with reference to the private partition relied upon by them, the plaintiffs were not entitled to have a declaration of their right to collect rent from each plot of land situated in the mehal.

We are of opinion that this contention is right, a private butwara is certainly binding as between the parties to that butwara and persons claiming title under them. No doubt such a butwara is not binding against the Government or against a purchaser at a sale for arrears of Government revenue, who derives his title direct from the Government. But it seems to us to be quite unjust and unreasonable to hold that the plaintiffs are at liberty to set aside a long existing arrangement deliberately entered into by their predecessors in title, merely because they think that they were entitled under the decrees passed in the previous suit to have a re-division of the mehal under the provisions of Regulation XIX of 1814. Whether that decree was right or wrong, it is not necessary for us to determine. It is sufficient for us to say that it has proved infructuous in consequence of the inability of the revenue authorities to carry out the butwara, the lands of the mehal in question being intermingled with those of other mehals bearing separate numbers on the Collectorate Towzee.

It has been contended that the decree in the former suit not only directed a re-division of the lands of the mehal in proportion to the share of 4 Gns. 1 O., belonging to the plaintiffs, but that it further declared that the plaintiffs were entitled to hold possession of a joint undivided share to that extent. So far as the wording of the decree is concerned, it appears to us clear that no such declaration was made by it. But without giving any final opinion on this point it is sufficient to say, that if the contention of the plaintiffs, with reference to the construction of the said decree, be adopted, the present suit must be dismissed, it being in that supposition a mere repetition of the suit previously instituted by them.

In this view of the case it seems to us clear that the only order we can pass in these two suits is that the decisions of the Lower Courts should be reversed, and that the plaintiffs' claims be dismissed, the plaintiffs being liable to pay to the defendants the whole costs of the litigation.

THE 7TH AUGUST 1872.

Present:

The Hon'ble F. B. KEMP, }  
" " F. A. GLOVER, } Judges.

CASE NO. 136 OF 1872.

*Miscellaneous Regular Appeal from an order passed by the Officiating Judge of Hooghly, dated the 21st March 1872.*

Meer Eyar Ally. Petitioner... Appellant,

versus

Taleb Ali ... .. Opposite party.

*For Appellant, petitioner*—Mr. J. P. Kennedy and Moulvies Murhamut Hossein, Mahomed Youssoof and Abdool Baree.

*For Opposite party, Respondent*—Baboo Kally Prosunno Dutt.

Held, that as the object of Act XXVII of 1860 is to facilitate the collection of debts on successions, no list of debts owing to the estate of the deceased being filed, a certificate cannot be granted under that Act.

The material facts may be gathered from the judgment in which they are clearly set forth.

*Kemp, J.*—(*Glover, J., concurring*).—This was an application on the part of two parties claiming a certificate under the provisions of Act XXVII of 1860, to collect the debts due to Noor Ali who died on the 20th Pous 1278. The Judge after taking evidence and referring to the Genealogical table filed by the objector Taleb Ali, granted a certificate to Taleb Ali. On referring to the record, this being a regular appeal, we find that neither party filed any list of the outstanding due to the estate of Noor Ali. The Appellant Eyar Ali with his first petition filed a list of the immovable property belonging to the deceased and also mentioned an item of cash and certain gold and silver ornaments, but no list of debts was given, and subsequently in a petition he said that the list of debts had not been given by a

mistake. The opposite party, the objector below, Taleb Ali also filed no written statement of the debts due to the estate of Noor Ali.

The object of Act XXVII of 1860, is to facilitate the collection of debts on successions as also to afford security to persons paying debts to the representatives of deceased persons, and as in this case no list of debts has been filed, we think that the Court below was wrong in granting a certificate to either party. We therefore under the provisions of Section 6 of Act XXVII of 1860 suspend the certificate which has been granted to Taleb Ali. Each party will pay his own costs of this appeal.

THE 12TH AUGUST 1872.

*Present:*

The Hon'ble F. B. KEMP, and } *Judges.*  
 „ F. A. GLOVER.

*Special Appeals from the decision passed by the Judge of Midnapore, dated the 26th August 1871, reversing a decree of the Sudder Moonsiff of that district, dated the 30th August and 17th September 1870.*

CASE No. 150 OF 1872.

Ram Churn Banerjee, ... (*Plff.*) *Appellant,*  
*versus*

Torsta Churn Paul, ... (*Def.*) *Respondent.*  
*For Appellants.*—Baboo Sreenath Dass and Hem Chunder Banerjee.

*For Respondent.*—Ghose, Baboos Unnodapershi Banerjee.

CASES Nos. 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

Ram Churn Banerjee, ... (*Plff.*) *Appellant,*

Nilkunto Dew, ... (*Def.*) *Respondent.*

*For Appellants.*—Baboo Sreenath Dass and Hem Chunder Banerjee.

*For Respondent.*—Ghose, Baboos Unnodapershi Banerjee.

*For Appellants.*—Baboo Sreenath Dass and Hem Chunder Banerjee.

*For Respondent.*—Ghose, Baboos Unnodapershi Banerjee.

*For Appellants.*—Baboo Sreenath Dass and Hem Chunder Banerjee.

*For Respondent.*—Ghose, Baboos Unnodapershi Banerjee.

*Kemp, J. (Glover, J. concurring).*—The facts are fully set forth in the Judgment. It is admitted one decision will govern these three cases.

Plaintiff is the special appellant, he sued claiming as rent a "dastoorat jummah."

The Moonsiff held that Dastoorat was not an Abwab or cess but that it was an annual demand due to the original zemindar which in the event of a sale of a talook is reserved as a debt payable by the purchaser." He further found that there was evidence which proved that Plaintiff had realized this jummah for 10 or 12 years.

The defendant, the Moonsiff says, has failed to adduce witnesses: he cited the plaintiff but he did not appear.

The claim of the plaintiff in the three cases was decreed.

On appeal, the zillah Judge Mr. Bainbridge reversed the decision of the Moonsiff. He, the Judge was of opinion that the relation of landlord and tenant did not exist between the plaintiff and the defendant, and that the suit therefore was not cognizable under the provisions of Act 8 of 1869. Mr. Bainbridge was also of opinion that the decision of the late Sudder Dewanny, dated the 13th December 1854, had only decided the right to dastoorat and not that it was rent.

A decision of a former Judge of Midnapore Mr. E. Jackson was referred to in the Court below: This decision is dated the 18th September 1861, in which Mr. Jackson held that a suit to recover dastoorat would lie under the rent Law (the Act X of 1859) but Mr. Bainbridge declared that he was unable to follow that decision.

Holding therefore that the Moonsiff had no jurisdiction to try the suit under Act VIII of 1869, inasmuch as the relation of landlord and tenant as between the plaintiff and the defendant did not exist the Judge decreed the appeal and dismissed the plaintiff's suit.

In special appeal it is urged:

1st. That the Lower Appellate Court is wrong in holding that the suit is not cognizable under Act 8 of 1869:

2nd. That the decree of the Lower Court distinctly established the relation of landlord and tenant between the plaintiff and the predecessors of the defendants;

The first point for decision is whether dastoorat is rent or not.

In the Court below the pleadings on both

we may say that the pleaders for the appellant have been equally unsuccessful in this Court. It appears that when the parent zemindary was sold, the condition of sale stipulated for the payment of a small pittance by the purchaser as subsistence of the former Malik. This dastoorat has been further subdivided by subsequent transfer of the different Mouzahs which comprised the original Zemindaree. It is admitted that the defendant pays revenue direct to the Collector and that he is an independent landholder, it is therefore not easy to see how the relation of landlord and tenant can exist between the plaintiff and the defendant.

"Dastoorat is explained in Nelson's Glossary to be an allowance for expenses of collections granted by the Mahomedan government. The decision of the late Sudder Court which was referred to during the argument, is to be found at page 504 of the decisions of 1854. The Court in a judgment for a few lines held that dastoorat was not a cess such as is prohibited by Section LV, Regulation VIII of 1893, but that the term seemed to imply a reservation of a certain annual payment by the purchaser of the talook to the seller the original proprietor of a small sum." The Court did not hold that Dastoorat was rent.

The old decision in 1795 to which the grandfather of one of the defendants was apparently a party did not decide that dastoorat was rent. The letter of the Sudder Board of Revenue shews that dastoorat was "never paid" they were of opinion that the term seemed to imply the reservation of a certain annual payment by the purchaser to the seller the original proprietor of a small sum.\*

But, it was contended by Baboo Hem Chunder Banerjee who admitted that "dastoorat" was not rent, that we must look to the conduct of the parties, and also to the finding of the first Court on the evidence that the "dastoorat," call it rent or by any other term, had hitherto been paid by the defendant to the plaintiff. The Judge no doubt considered this point. The Jumma Wasel Bakese filed by the plaintiff in support of a part payment has been inspected by us; it has been clearly tampered with, the sheet which refers to payments of "dastoorat,"

We concur with the Judge in holding that the relation of landlord and tenant as between the plaintiff and defendants is not made out and that these suits are not cognizable under Act VIII of 1869.

As a last resource the pleaders for the appellant referred to a very late decision of a Divisional Bench of this Court published in the Weekly Reporter, Vol. 18, page 99, and contended that even supposing the suit was not really a suit for rent it was not liable to be dismissed in order that a fresh suit might be instituted under Act VIII of 1859.

In answer we say the point was not taken in the Court below nor in the grounds of special appeal.

The three appeals are dismissed with costs of all the Courts payable by the appellant.

THE 14TH AUGUST 1872.

Present :

The Hon'ble Sir RICHARD } Chief Justice.  
COUCH, KNIGHT,

The Hon'ble W. AINSLIE, ... Judge.

CASE NO. 45 OF 1872.

*Special Appeals from the decision passed by the Subordinate Judge of Tirhoot, dated the 11th September 1871, affirming the decree of the Moonsiff of Durbhangah dated the 27th March 1871.*

Jewan Chowdhry and others, (Plffs.) Appellants,

versus

Doolar Chowdhry and others } Defendant.  
1st party,

CA. No. 53 of 1872.

Manna Chowdhry certificate under... Appellant

VII of 1860, to

Doolar Chowdhry Ali who died of (Def.) Re

Judge after taking the Genealogical pendants

For Appeal Feb Ali, granted ama Churi

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For Response regular appeal,

1. Every admit filed any list of evidence. It m be shewn in a sube. he same parties have been not true. estate of Nr instance wh it is acted upon by the with his living effect to

2. A Lower Appellate admission with reference to moveable pr. in law as a regular case cannot be said to enable the High Court to And also ment decision such Lower Appellate Court obtain gold

Plaintiffs are Sp. of deb

They sue for petition

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\* These words are quoted by the Sudder Dewanny in their decision of the 18th October 1854.



14 Renus and 11 Paras in 3 mouzas and for an order on the Collector to divide the mouzas according to that share. They allege that, on the 6th of Srabun 1210 Fuses, the ancestors of plaintiffs and defendants purchased from one Baboolall, the Auction-purchaser, 16 ans. share of the three mouzabs, viz. Mohendepoor, Jumowa and Seepoora, the shares of the parties being as follows:—

## A. G. C.

1. Sham Sing Chowdhry (ancestor of Plaintiffs Jewan Chowdhry and others) ... ..	4	13	3
2. Lullit Chowdhry (ancestor of defendants' 2nd party, plaintiffs, Manna Chowdhry and others) ... ..	4	13	3
3. Takoor Chowdhry (ancestor of defendants' 1st party, Doolar Chowdhry and others) ... ..	2	0	0
4. Balmun Chowdhry (ancestors of defendants' 3rd party, Poch Chowdhry and others, ... ..	4	0	0
5. Ajib Chowdhry (ancestor of defendants' 4th party, Rammun and others) ... ..	0	12	2

That Rammun Chowdhry and others, heirs of Ajib Chowdhry, brought a suit for a fifth share of the mouzas, and obtained a decree on the 1st of April 1857 for 3 ans. 2 guds. share, thus securing 2 ans. 11 guds. 2 cowries in addition to their legitimate share of 12 guds. and 2 cowries, which being deducted *pro rata* from the share of each shareholder, plaintiff continued in possession of 3 ans. 18 guds. 1 dunt 14 renus 11 paras, defendants' No. 2 of an equal share, the heirs of Rammun of 3 ans. 6 guds. 2 cowries 1 kr. 13 ren. 12 par., and defendants' 1st party of 1 ans., 13 guds. 1 cowree, dunt 16 renus 14 paras. Out of the shares belonging to plaintiffs' ancestors their without Bhowanee Dul Chowdhry and 10 guds. 1 cowree 1 kr. 13 ren. 12 par. and Gudar Chowdhry and 3 guds. 5 toes and 10 ren. Beharee Chowdhry. The plaintiffs' 1st party for a butwara of their shares of 10 ren. in the Collectorate, but on the 1st of the defendants' 1st party to the plaintiffs' 1st party on the 1st of the plaintiffs' 1st party. H. no claim on the 1st of the plaintiffs' 1st party. a refund of the 1st of the plaintiffs' 1st party. for that decree for a per-

chasers, named in the *kabala* purchased equal shares in the mouzabs, and are in possession of equal shares, that plaintiffs' allegation of unequal shares is false, and that they are in possession of 3 ans. 4 guds. share with the vendors of their co-sharers.

The Moonsiff gave a decree for 2 ans. 10 guds. 2 cowrees share, which was confirmed in appeal by the Subordinate Judge on these grounds:—1, The original Byenama has not been produced, but it is admitted to be joint. Hence the purchasers must have purchased in equal shares. 2, That the heirs of Ajib Chowdhry obtained a decree for  $\frac{1}{5}$  share in 1857 in the presence of all the parties, hence the question of share has been set at rest. 3, That Baboolall Chowdhry purchased from Bhowanee Dul Chowdhry, brought a suit against Kanie Chowdhry, his son, for 14 guds., but it was reduced to 10 guds. the share of Sham Sing having been determined to be 3 ans. 4 guds. only. The decree is dated 16th August 1865. 4, That plaintiffs contended that Takoor Chowdhry, ancestor of defendants' 1st parties, admitted his share to be 2 ans. only by his Byenama of 15th Mohurum 1221 or 24th January 1864 for a  $\frac{1}{5}$  anna share in favor of Bishnee Jha is not found inasmuch as that does not show that his share was not more (See Ruling 4th January 1871, Nathoo Sahoo). 5, The admission by defendants' 1st party that their share is 2 ans. in the suit by Ajib's heir is not binding as against present plaintiffs. The evidence of possession is not sufficient. 7, In the Batwarah petition of 1868, the plaintiffs' cause was not maintained.

*R. Couch, Chi on the 12th of 1868. It tried was, which date the laws for repeal only entitled under the laws for repeal. fifth. The cowrees, ending, any regular five origintuee, the laws for all persons which then the for the whole of the of Assin 1276. Empire. By this enactment, September provided that any laws dis- the play the Court of Directors should be forthwith repealed, that local regulations should have the force of Acts of Parliament, that the Governor-General should not, without the sanction of the Court of Directors, authorize any Court*



the deed they would be entitled to. The plaintiffs rest their case upon what are called admissions by the first defendants in one or both the suits (I think it was in both) brought by the other sharers; the present plaintiffs and the first defendants being defendants in those suits, and the case then set up by the first defendants being that they were only entitled to the share which the plaintiffs now say they are entitled to. The Court in both suits found that the property was held in equal shares, and negatived the truth of the admission. It is only an admission and may be shewn in the present suit not to have been true; and it was for the Court to consider whether it was true or not, it thought that it was not true, it was not bound to give effect to it. A mere admission is not conclusive. It is only in certain cases that it is so, for instance, where it has been acted upon by the party to whom it was made. That was not the case here. This was a statement made to the Court, which so far from acting upon it, passed a decree opposed to it. This admission cannot be treated as conclusive, nor can it be said that the Court was wrong in not giving effect to it.

Then with regard to the *kobalah*, which is a very ancient deed, the ancestor of the first defendants states that the share was a two annas share. That certainly appears to be evidence of some weight upon that point, it is an admission made by the defendant's ancestor and may be used against term. But that again is only evidence upon certain annual rent which is trying the suit the seller the or not, according as it constitutes.

But, it was considered by the case Chunder Banerjee who admitted to "inclined to rent" was not rent, that we must both the conduct of the parties, and also the finding of the first Court on the point that the "dastoorat," call it rent or other term, had hitherto been paid by the defendant to the plaintiffs. The Judge no doubt considered this point. The *Jumna Wasel Bakes* filed by the plaintiff in support of a part-payment has been inspected by us; it has been clearly tampered with, the sheet which refers to payments of "dastoorat."

\* These words are quoted by the *Buddar Dewanny* in their decision of the 15th December 1854.

their decrees we should be in effect directing them to find for the plaintiffs upon that admission, which certainly we have no power to do.

The appeal must be dismissed, but without costs, no one having appeared for the respondents.

#### REGULAR APPEAL NO. 113 OF 1872.

*Regular Appeal from a Decision passed by the Deputy Commissioner of Zillah Manbhoom, dated the 31st of January 1872.*

The 2nd Sept. 1872.

Present:

Hon'ble F. B. KEMP, and } Judges.  
" C. PONTIFEX, }

A suit for a refund of money realised under a rent decree founded upon a contract will lie in the Civil Court when that contract (and virtually the decree based upon it) is subsequently superseded and modified by a decree of the Civil Court.

In such a suit the cause of action accrues on the date on which the money is realised in execution and not on the date on which the decree is passed.

Rajah Nilmonce Singh Deo } Defendants'  
Bahadoor ... } Appellant,

versus

Sarodapershad Mookerjee, } Plaintiffs'  
Respondent.

*For Appellant*—Mr. R. T. Allan, Baboo Opendro Chunder Bose and Bhobanee Chunder Dutt.

*For Respondents*—Baboo Sreenath Das and Beprow Mookerjee.

The facts of the case were safely gathered from the judgment of the Respondents' counsel, Mr. Chowdhury, who acted in the case of Shama-ud-din, the General, and others, Appellants, against the Respondents, Baboo Ali, Baboo Shad Roy Chowdhury and others, Respondents. *Moore's Indian Jurist*, p. 203.

Every admission shewn in a suit have been not true, it is acted upon by the defendant, Rajah Nilmonce Singh Bahadoor, is the Appellant, and the Respondents, Baboo Ali, Baboo Shad Roy Chowdhury and others, Respondents. *Moore's Indian Jurist*, p. 203.

Plaintiffs are Spent of debts with them. They sue for a petition for the return of the 3 annas 4 panna not been upon with

The assets of the putnee were stated in the putnee lease to be Rs. 6,720-15-14½ gundahs. The Putneedar brought a suit in the Civil Court against the Rajah on the ground that the assets were not as stated in the lease Rs. 6,720-15-14½, but that they fell short of that sum by Rs. 1,924-1 anna and the Putneedar obtained a decree in the Civil Court for abatement of the Putnee rent to the extent of Rs. 1,924-1-5 per annum. The Rajah in the meanwhile brought a suit for the rent of the year 1267, and for that of the year 1268 against the Putneedar upon the full Jumma of Rs. 6,720 15-14½, and obtained a decree. The Putneedar's suit for abatement in the Civil Court had been instituted before the Rajah brought his suit for rent. The Putneedar in the rent suit urged that his suit for abatement was pending in the Civil Court, and he objected to pay the full rent of 1267 and 1268 to the Zemin-dar. The present suit is therefore brought for refund of Rs. 1,924-1-1 minus a small deduction of Rs. 12 4 5 already refunded under the Civil Court decree, or Rs. 1,911-12-15 for the year 1267; and of Rs. 1,924-1-1 for the year 1268 together with the interest recovered by the Rajah on these excess payments made on account of the rent for the two years 1267 and 1268. The interest was calculated up to the date on which the Rajah took out the money in execution of his decree, that is to say, up to the 12th of Assin 1276.

pils

Interest is also catered on the above amounts for principal, and is drawn by the Rajah, or upon the putnee within the 13 15-2 and into the law, provided that being the sum which is on imports, and from the plaintiff on the 27th of September 1869, on which date the laws for repeal-gundahs 15, cowrah ending, any regula-what the Putneedar like laws for all persons interest upon the 12th of Assin 1276. By this enact-September provided that any laws dis-September the Court of Directors should, with repealed, that local regula-tions should have the force of Acts of Parliament, that the Governor-General should not, without the sanction of the Court of Directors, authorize any Court, not established by Royal Charter, to sentence to death any of His Majesty's

The Rajah objected to the plaintiff being barred by the final decree which he obtained on the 4th of September 1869, that no claim on the part of the plaintiff for a refund of the rent paid under that decree for a period previous to the above order should be maintained.

The Lower Court of the Deputy Commissioner of Manbhoom has given the plaintiff a decree for the whole of the amount claimed.

On appeal the points taken by Mr. Allan, the pleader for the appellant, the Rajah, are these, 1st, That as the decree for rent is a final decree, the plaintiff is not entitled to bring this suit for refund of any sum recovered by the Rajah in execution of that decree. 2nd, That the suit is barred by the statute of limitation inasmuch as it has not been instituted within three years from the date of the decree for rent, 3rd, That the decree of the Civil Court for abatement operates only prospectively and not retrospectively; and lastly, Mr. Allan takes objection to the interest which has been allowed by the Court below.

With reference to the first objection we find that when the rent-suit was instituted by the Rajah, he had full notice that the suit of the plaintiff for abatement was pending in the Civil Court objection to pay the full rent, was taken by the plaintiff at the time the rent-suit was brought, but the Collector refused to entertain that objection, and a decree was passed for the amount claimed by the Rajah according to the contract entered into by the parties.

Subsequently the decree of the Civil Court was in favor of the plaintiff, and abatement of rent to the amount of Rs. 1,924, anna 1, gunda 1, per annum, was decreed. Therefore the decree of the Revenue Court is superseded and modified by the decree of the Civil Court which was subsequently affirmed in appeal by the High Court on the 4th of September 1868.

On the second point, the plaintiff's cause of action accrued on the 12th of September 1869, on which date the laws for repeal-gundahs 15, cowrah ending, any regula-what the Putneedar like laws for all persons interest upon the 12th of Assin 1276. By this enact-September provided that any laws dis-September the Court of Directors should, with repealed, that local regula-tions should have the force of Acts of Parliament, that the Governor-General should not, without the sanction of the Court of Directors, authorize any Court, not established by Royal Charter, to sentence to death any of His Majesty's

\* These words are quoted by the Sudder Dewanny in their decision of the 13th December 1854.



[No. 7.

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not established by Royal Charter, to  
sentence to death any of His Majesty's

natural born subjects and their children, nor abolish any Court established by Royal Charter. By this enactment the Local Legislatures were superseded, and one central legislative authority was established. The Supreme Council, thus constituted, continued to exist till 1853 in all its integrity when certain modifications were introduced, but it was not till 1861 that a new system was called into existence. By the Act of 1853 the Legislative Council, which originally consisted exclusively of the Governor-General, of two civilians and one military gentleman and a legal member, besides the commandor-in-chief, if an extraordinary Member of that assembly, was considerably strengthened by the addition of new members two of whom were judges of the Supreme Court of Calcutta, and the others representatives from the several Local Governments. The importance of the fourth ordinary member was also heightened by his being made a member of the Executive Department also. Bills were referred to Select Committees instead of to a single member, and the proceedings were conducted with open doors. This state of affairs, which partook as it was said of the character of the British House of Commons, was believed to be wholly unsuited to the genius of the Government, and, accordingly upon the representation of Lord Canning, Sir Charles Wood, the then Secretary of State, had, what is called the Indian Council's Act 1861 (24 and 25 Vic. passed by the British Parliament. This Act the Legislative power by the Council continue as heretofore the 27th make laws generally and resp. the Sud- or alter any laws at its discrethe 16th it cannot repeal or any way mo proviso of any Act of Parliament edent since 1860, affecting Her Majesty's i a possessions, nor can it pass any law affecting the authority of Parliament, or the constitution and rights of the East India Company, or any part of the Common Law of Great Britain and Ireland on which may depend the allegiance of any person to the Crown

or the sovereignty or dominion of the Crown. And in particular the Council has no power to repeal or affect any of the provisos of the Acts\* which remained in force at the time of the passing of the Indian Council's Act.

The Act provided that no law made by the Governor-General in Council should be deemed invalid simply because it affected the prerogative of the Crown.

The Act legalized all the ill-digested rules and orders which had been made for the non-regulation provinces. No legislative force, however, belongs to any orders and rules which have been issued by the Executive Government since the passing of the Act in 1861. The Governor-General's Council possess the sole legislative authority for those provinces.

Under this Act the Governor-General has the power to make and promulgate from time to time ordinances for the peace and good government of the British Indian territories, which, however, have the force of law for the space of six months from their promulgation, unless disallowed earlier by Her Majesty or controlled and superseded by any law passed by the Legislature. Lord Mayo exercised this power in 1869 for the purpose of imposing an additional half per cent Income Tax, and afterwards in the same year to exclude a distinct portion of the Punjab frontiers from the jurisdiction of the Civil Court.

The Act further provides that the previous sanction of the Governor-General is necessary for any measure can be introduced by the Council affecting the revenue, public revenue, or the words change can be made.

Every of Pontefract, J. ty, and the gious rites be shown in defendant Lower Court or Majesty's have been not defendant Lower App. is acted upon and, is defendant Lower App. with reference to the maintenance of any High Court to d interest and's Military or Naval force per 15 days f

Execution  
\* Acts 3 and 4, cases 4 IV, Chap. 85; 16 and 17 Vic. Chap. 85, 17, per C. 18 Vic. Chap. 77, 21 and 22 Vic. Chap. 106, and 23 Vic. Chap. 41.

4. The relations of the Government with foreign princes or states.

The Act re-established the Local Legislatures of Madras and Bombay, but the assent of the Governor-General was necessary to the validity of any law which might be made by such Councils. The previous sanction of the Governor-General is necessary before either of the Councils can take into consideration any law for the following purposes:—

1. Affecting the public debt or the customs, duties or any other taxes imposed by the Government of India.

2. Regulating issue of current coins or issue of bills, notes, or other paper currency.

3. Regulating the conveyance by the Post Office or messages by the Electric Telegraph within the Presidency.

4. Altering Act XLV of 1860.

5. Affecting the religion or religious rites and usages of any class of Her Majesty's subjects in India.

6. Affecting the discipline or maintenance of any part of Her Majesty's Military or Naval forces.

7. Regulating Patents or copy-right.

8. Affecting the relations of the Government with foreign princes or states

The Act empowered the Governor-General to extend the provisos relating to the establishment of Local Legislatures to the Bengal Division of the Presidency of Fort William and to the territories known as the North-Western Provinces and the Punjab respectively, as well as to new provinces which may be constituted into Subordinate Governments. Accordingly, the Bengal Legislative Council was constituted under a proclamation, dated 10th January 1862. No other Local Legislatures have yet been established.

It will be seen in spite of the decentralization alluded to by the Indian Council's Act, the Governor-General remains at the head of the legislative authority exercised in British India, his assent being necessary before any Acts made by the Local Legislatures can have the force and effect of laws. Such

assent, however, was not necessary in respect of regulations passed by the Local Legislature, which existed before 1834.

In Lecture VI the learned professor adverts to what he is pleased to call the Presidency Town System. He considers the Presidency Courts, and we think properly, to be the relics, with enlarged powers, of the judicial institutions which had been originally established by the Crown and Parliament for the administration of justice in the Company's factories and settlements before the acquisition of sovereign power. The Mofussil Courts, however, were established by the East India Company to meet the requirements of territorial acquisitions, and had originally no jurisdiction over British subjects. This double system, as the professor calls it, is maintained to a certain extent even to this day.

The jurisdiction of the Supreme Court was first extended by Act 24, George III, Chapter 25, which enabled it to try all criminal offences by His Majesty's subjects in native states or against their persons or properties, &c., and by 26, George III, Chapter 37, all His Majesty's subjects resident in India were made subject to the Courts of Oyer Terminer and Goal Delivery for offences committed in any part of Hindoostan, Africa, and America beyond all the limits of the Straits of the Congo, and all colonies, and all countries within the limits of the Court, and all colonies, and all countries within the limits of the Court, and all colonies, and all countries within the limits of the Court.

By the 10th of the Court, its admiralty jurisdiction was limited to offences committed on the coasts of Bengal, Behar, Orissa within the ebbing and flowing of the sea at high water-mark, but Acts 33, George III, 39 and 40, George III, and 53, George III gradually extended its powers, the last enabling them to take cognizance of all crimes perpetrated on the high seas by any person or persons whatsoever. Benares having been ceded to the Company, 39 and 40 George III, extended the jurisdiction of the Court to that district or province. In Madras and Bombay the Mayor's Court which had been established in 1753, existed till 1797 when they were replaced by the



1. Trial, 17<sup>th</sup> <sup>CHAP. IV.</sup> <sup>C18 VI</sup> <sup>and 23 W55.</sup> Vignent of offences  
under 53. 65, and 23 W55. VII of 1853



and XXV of 1861, sections 163 and 165 by summary conviction and without a jury.

2. Investigation of charges in view to committal or discharge of the accused.

3. Prevention of crime and breach of the peace. Provision for appointment of Coroners was made by Stat. 33, Geo. III, Chapter 52. The law, which regulates their jurisdiction and proceedings, will be found in Act IV of 1807 of the Imperial Legislative Council.

The learned professor next alludes to the distinction which the Legislature has made in favor of European British subjects with reference to the administration of criminal justice, and concludes the Lecture with a hope that in a "few years we may possess not only a uniform civil law, but as nearly as possible a uniform system of its administration."

Lecture VII gives us a history of the Mofussil Courts. These courts, it will be remembered, were originally established by Warren Hastings in 1772. The leading feature of his scheme was the union of judicial and fiscal powers in the same officers.

In 1775, considerable modifications were introduced into that scheme. The superintendence of the collection of the revenue was vested in the Provincial Councils of Calcutta, Burdwan, Dacca, Moorshedabad, Dinajepore and Patna, and the administration of civil justice transferred from the European Collectors to Native Amlahs who were appointed instead. From them an appeal lay in every case to the new provincial councils, and thence under certain restrictions to the Governor and Council as the Sudder Court.

In 1780, the separation of the civil and revenue administration was completed under the Regulating Act of 1773, passed in that year. The jurisdiction of the six Provincial Councils was exclusively of revenue nature. Regulation I of 1793, which was made by Mr. Sessé, gave cognizance of all persons of exorbitant wealth, above the pecuniary limit of whose jurisdiction, under Regulation XL of 1793, was Rupees 50; of these the Head

constituted into a Court of Record under 21, George I, chap. 70.

In 1787, Lord Cornwallis revived the system originally propounded by Warren Hastings. The functions of civil justice and the collection of the revenue were united in the person of the Collector. All revenue cases were transferred to the Collector, from whom an appeal lay to the Board of Revenue, and finally to the Governor-General in Council.

In 1793, Lord Cornwallis found that the union of the civil and fiscal powers in one and the same individual, was all but calculated to promote the ends of justice (*vide* Preamble to Regulation II of 1793), and accordingly Collectors were again restricted to their executive functions, and courts of justice were established upon an efficient and independent basis under Regulation III of 1793, in twenty-three zillahs and three cities.

The Sudder Dewany Adwalut was established at the Presidency, and under Regulation VI of 1793, consisted of the Governor-General and Members of the Supreme Council. Under Regulation II of 1801 it was made to consist of three judges to be selected from the covenanted service of the Company, and in 1811 it was made to consist of a chief judge and as many puisne judges as the Governor-General in Council should think necessary.

Under Regulation III of 1831, a Sudder Dewany Adwalut was established for the North-Western Provinces with similar powers.

There were six Provincial Courts: four for the provinces of Bengal, Behar and Orissa; and one for Benares, and another for the Ceded and Conquered Provinces.

Subordinate to the city and zillah courts, were, 1st, the Registers of these courts, who, when authorized by the judges, were empowered to try and decide causes for amounts not exceeding 200 rupees, their decrees not being valid until revised and countersigned by the judge; and 2nd, the Native Commissioners the pecuniary limit of whose jurisdiction, under Regulation XL of 1793, was Rupees 50; of these the Head

Commissioners were called Sudder Ameens, and the rest Moonsiffs.

Regulation XXIII of 1814, consolidated the law relating to Moonsiffs and Sudder Ameens, but it was not until after the passing of Regulation V of 1831, that the native judicial service acquired something like respectability.

Mr. Cowell next adverts to the attempts that were made from time to time to reunite the civil and the revenue jurisdictions in one and the same individual.

The first attempt was made in 1794. Regulation VIII of that year authorized the court to refer to the Collectors for report all cases which, before the new system, had been cognizable by them.

The second attempt was first made in 1795, and afterwards renewed under Regulations VII of 1799, and V of 1812, commonly known as the Hufum and Punjam law respectively.

The third attempt was made in 1821, when by Regulation XIV of that year revenue officers were authorized to hear, investigate and determine by a summary process, subject to a regular suit in the civil court, all rent suits which might be referred to them by the judges. In the trial of these suits they had the same powers as the civil courts, but their decrees could only be executed by the civil courts.

This was followed by another Regulation in 1831, which transferred all jurisdiction in summary suits for rent to the exclusive cognizance of Collectors whose decisions were to be final, the Commissioner having power to revise decisions only on the ground of the cases not being of a nature cognizable as summary suits.

Act X of 1859 continued the same state of things and invested the revenue authorities with larger powers than they had possessed before.

Act VIII of 1869 (B. C.) has however superseded Act X of 1859, and its provisions have been extended by an order, published in the *Calcutta Gazette* of 2nd March 1870, to the districts therein named.

In the Madras Presidency, a system of courts based upon the plan of Lord Cornwallis was adopted in 1802. The civil and revenue courts were kept distinct. The decision of the judge in suits under 1,000 rupees was final. Registers could try only the suits referred to them; there were 4 Provincial Courts of appeal, and the Sudder Court consisted of the Governor in Council from whom an appeal lay to the Governor-General in Council in suits of the value of 45,000 rupees. The constitution of the Court was altered, and new judges were appointed in 1806 under Regulation IV of that year. By Regulation III of 1807 the Governor ceased to be a judge.

By Regulation IV of 1816, heads of villages were appointed Moonsiffs with power to decide suits not exceeding ten rupees in value. They could assemble Panchayets, who could decide suits for any amount or value, the decision being according to the opinion of the majority. Regulation V of 1807 empowered Provincial Courts to quash the decision of the Panchayet, and refer the matter to a second Panchayet, whose decision, if in accordance with the first, was final.

By Regulation VII of 1843, provincial courts were abolished and new zilla courts established, and the jurisdiction of Principal Sudder Ameens and Subordinate Judges was raised so as to include all suits of less value than 10,000 rupees.

In 1794, the Court of Directors sent to the Bombay Presidency a copy of the Regulations proposed by Lord Cornwallis for the Bengal provinces, and eventually civil and criminal courts were established upon that basis. In 1837, all the former Regulations were rescinded, and a new Code passed based upon the Bengal Regulation of 1837. Act XXIX of 1845, Zillah Judges, and appointed.

In Madras an appeal from the lower courts appears that the revenue of defendant in suits. In the former cases of the committed case lay to the Zillah Court, and the interest of the plaintiff, to the Sudder Court. 15 days of the 1866, Bombay Council Executive. Revenue Courts of the 18th century of offices relating to the year 1855, VII of the

use of wells, tanks, water-courses and roads to fields, and vested the same in the Civil Courts.

In Lecture VIII, the learned Professor treats of the Police and the Criminal Courts in the Mofussil.

It appears that under the Regulation of 1772, Fouzdary Adwaluts were established in Bengal under the superintendence of the Collectors of Revenue to administer Mohomedan law in all criminal cases.

A Sudder Nizamut Adwalut at Moorshedabad exercised a general control over the Lower Courts under the supervision of a Committee of Revenue. The Committee being abolished, the Adwalut was brought to Calcutta, but when in 1775 Mohamed Reza Khan was restored to the superintendence of the Criminal Courts in the country, it was again removed to Moorshedabad, where it remained fifteen years.

In 1790, the powers which had been before that time exercised by the Nabab Nazim in criminal matters, passed to the Governor-General.

The zemindars having been deprived of their powers as conservators of the public peace in 1772, Warren Hastings in 1774 divided Bengal into fourteen Police Districts with Fouzdars and Thanadars as superintendents thereof.

In 1781, the Fouzdars and Thanadars were abolished. Civil Judges were empowered to arrest and forward the offenders in their districts to the nearest Daroga, the power of punishment still resting with the Nabab's officers.

The Civil Judges were subsequently authorized to hear and decide petty criminal cases, a report of their proceedings being every month sent to the Office of the Remembrancer of the criminal courts.

This system having proved to be certain Regulations were issued in December, 1790, establishing a session in which the superintending Magistrate, assisted by Mr. Sessions, executed account of trying persons of misdemeanours, above ten years, General and Nizamut Ad

administration of criminal justice throughout the provinces.

In 1793, the whole of the Police and criminal administration was remodelled. The authority of the Nizam was abolished, and the Governor-General and Council constituted the Sudder Nizamut Adwalut.

By Regulation II of 1801, the Sudder Nizamut Adwalut was directed to be composed of a chief judge and puisne judges.

Next in rank to the Sudder Nizamut Adwalut were four Courts of Circuit, which were afterwards increased in number. They were abolished by Regulation I of 1829, and replaced by twenty Commissioners of Revenue and Circuit. This experiment also failed.

By Regulation V of 1831, Magistrates were empowered to refer to native Judges any criminal case for investigation.

Under Regulation VII of 1831, any Civil Judge might be appointed to hold sessions and gaol deliveries.

In Regulation VI of 1832, provision was made for referring suits to a Panchayet or constituting assessors to assist the Judge.

Mr. FitzJames Stephen having discovered that there was no legal authority for the appointment of Sessions Judges, he caused the Bengal Sessions Court Act of 1871 to be passed to remedy the defect. This was, however, a temporary measure, the Act repealed by Act X of 1872.

In the Presidency of Madras a system of administration of criminal justice, based upon the Bengal system, was introduced in 1802. Magistrates and their assistants were empowered to apprehend and bring to trial all persons charged with criminal offences, and in light cases to inflict suitable punishment. Four Courts of Circuit were established, and a chief criminal court consisted of the Governor and his Council. In 1827, assistant judges and judicial judges with criminal jurisdiction were appointed. Native magistrates, afterwards called Principal Sudder Ameens, were subsequently appointed, but they had no jurisdiction over Europeans and Americans.

The Courts of Circuit were abolished in 1845, and were replaced by Zillah Judges. Natives might be called to assist as assessors or jurors.

With regard to the Presidency of Bombay, the governor-General in Council authorized the establishment of criminal courts in 1797. Hindoos were tried by their own criminal law, and Parsees and Christians by the English law. Mohomedan law did not generally prevail in this Presidency. The Governor in Council exercised an appellate jurisdiction.

A revised code was introduced in 1827. Magistrates tried petty offences, Zillah Judges and Assistant Judges exercised criminal jurisdiction generally, and the Court of Circuit, held by one of the Fouzdary Adwalut judges, took cognizance of the most heinous offences. A special court, consisting of three judges, selected from the Sudder Fouzdary Adwalut, and the zillah courts took cognizance of political offences, from whose decision an appeal lay originally to the Governor in Council and since 1827 to the Fouzdary Adwalut. Regulation XIV of 1827 embodied the Penal Code.

In 1830 the Provincial Court of Circuit was abolished. Joint Sessions Judges were appointed under Act XXIX of 1845. Since 1841 crimes against the state are cognizable by the ordinary criminal courts.

For the North Western Provinces a Court of Nizamut Adwalut was established in 1831.

In 1793, the zemindars in Bengal were relieved of all Police responsibility under the Government system. Magistrates were the head of the Police with Darogahs to act as their subordinates. Zillah and city judges exercised also the powers of magistrates. The jurisdiction of magistrates was extended in 1807, and by Regulation XVI of 1810, joint magistrates were appointed to assist them. By Regulation XII of 1818 they were authorized to inflict imprisonment for a time not exceeding two years.

For Benares a Superintendent of Police was appointed in 1808.

In 1817, all the Police rules, orders, &c., were codified by Regulation XX of 1817, the Darogah, the Mohurrir, and the Jemadar being the principal subordinate officers under the orders of the Magistrate.

In 1829, Courts of Circuit and the Office of Superintendent of Police were abolished, and their duties were transferred to Commissioners of Circuit.

In 1837, however, provision was made for the appointment of Superintendents of Police.

In Madras, the native Police system prevailed till 1816, when a revised scheme of Police administration was organized. Heads of villages aided by village watchmen were to arrest and send accused persons to the Tehsildar or head of the District Police. Magistrates, and their assistants were generally responsible for the peace of their districts.

In Bombay the Madras system was adopted in 1816.

In 1820, a Sudder Fouzdary Adwalut was established at Surat to take cognizance of all police and criminal matters, and to revise the proceedings of the subordinate authorities. The Judges were directed to go on circuit.

By the revised code of 1827, the police duties were directed to be conducted by the Judge and Collector of each zillah, by the district police officer and the heads of villages.

The first real attempt to reform the Police was made by Sir Charles Napier in Sind. The Police was on the model of the Irish constabulary. Lord Ellenborough ordered its extension to the N. W. Provinces, but left the country immediately afterwards, and there the reform stopped.

In 1847, 1837, George Russell Clerk commenced re-organizing Bombay on the Sind Police model.

Sir H. M. M. did the same for Zillah Courts.

In 1847, 1848, 1849, 1850, 1851, 1852, 1853, 1854, 1855, 1856, 1857, 1858, 1859, 1860, 1861, 1862, 1863, 1864, 1865, 1866, 1867, 1868, 1869, 1870, 1871, 1872, 1873, 1874, 1875, 1876, 1877, 1878, 1879, 1880, 1881, 1882, 1883, 1884, 1885, 1886, 1887, 1888, 1889, 1890, 1891, 1892, 1893, 1894, 1895, 1896, 1897, 1898, 1899, 1900, 1901, 1902, 1903, 1904, 1905, 1906, 1907, 1908, 1909, 1910, 1911, 1912, 1913, 1914, 1915, 1916, 1917, 1918, 1919, 1920, 1921, 1922, 1923, 1924, 1925, 1926, 1927, 1928, 1929, 1930, 1931, 1932, 1933, 1934, 1935, 1936, 1937, 1938, 1939, 1940, 1941, 1942, 1943, 1944, 1945, 1946, 1947, 1948, 1949, 1950, 1951, 1952, 1953, 1954, 1955, 1956, 1957, 1958, 1959, 1960, 1961, 1962, 1963, 1964, 1965, 1966, 1967, 1968, 1969, 1970, 1971, 1972, 1973, 1974, 1975, 1976, 1977, 1978, 1979, 1980, 1981, 1982, 1983, 1984, 1985, 1986, 1987, 1988, 1989, 1990, 1991, 1992, 1993, 1994, 1995, 1996, 1997, 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 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By Act 3 and 4, William IV, C. 41, a permanent Judicial Committee was appointed for the disposal of appeals and other matters referred to them by his Majesty in Council. The Committee was composed of the president of the Council and the Lord Chancellor and several Judges of eminence with power to the Sovereign to add any of his Privy Counsellors or Members to the Committee. Four members form a quorum, a majority of whom must concur in their report or recommendation. By an order in Council issued in 1838, the appealable value was fixed at Rs. 10,000 and upwards.

Act 11 of 1863 embodies the rules under which appeals may be preferred to the Privy Council.

On this subject the Charters of the several High Courts may also be referred to with advantage. In Lecture X the Professor begins by pointing out the distinctions between the courts established by Royal Charter and those established in the Mofussil by the Regulations. In the former the law administered was for the most part the law of England, and the proceedings were governed by the English law of procedure until 1834. They were amenable only to the legislative authority of Parliament, and to such Regulations of the Government as the Supreme Courts chose to acknowledge and register.

The Mofussil Courts, on the other hand, were wholly governed by the Regulations, and where the Hindoo or the Mahomedan law did not apply, nor had the regulations any bearing, the Courts were directed to proceed according to justice, equity, and good conscience. They had nothing to do with the English law.

The assumption of the Government by the Crown on the 1st day of November, 1858, was the first step towards the amalgamation of these rival institutions.

The abolition of the Supreme Courts and the establishment of the High Courts by 24 and 25, Vic. C. 104, were the next step towards that desirable end. The first Charter of the Bengal High Court is dated 14th May, 1862, and that of the

Madras and Bombay High Courts is dated the 26th June, 1862. The subsequent Charters which superseded those of 1862, are all dated the 28th December, 1865.

The High Courts exercise several jurisdictions, namely, the civil, original, and the ordinary, the extraordinary, the appellate, the insolvent, the criminal, the maritime, the testamentary and intestate, and the matrimonial.

In 1866, Letters Patent were issued for a High Court in the North Western Provinces of the Bengal Presidency. The Civil Procedure was divided by the Charter to be governed by Act VIII of 1859, but its Procedure, both civil and criminal, is to be regulated by certain amending Acts relating to that Court, exclusively, viz. Act XXIV of 1866 and Act XIII of 1869. The law or equity, which is administered in the original side of the High Court of Bengal is the same that prevailed in the Supreme Court, and is distinct from what is applied by the appellate side thereof. The criminal Admiralty, testamentary and maritime jurisdictions of the High Court are purely the same as those exercised by the court which it succeeded. Its criminal procedure is distinct from that of the appellate side. This really is amalgamation with a vengeance!!!

The Punjab Chief Court was established by Act IV of 1866. It is the highest of civil and criminal jurisdiction in the Punjab. Its jurisdiction, however, is barred when during a settlement of land revenue the Local Government invests the Financial Commissioner with the power of a court of final appeal in a certain class of cases. It has no jurisdiction over British subjects, and its jurisdiction is exercised by the Civil Judge Russell Clerk in the Punjab, Bombay on the 1st day of November, 1858, was the first step towards the amalgamation of these rival institutions. The abolition of the Supreme Courts and the establishment of the High Courts by 24 and 25, Vic. C. 104, were the next step towards that desirable end. The first Charter of the Bengal High Court is dated 14th May, 1862, and that of the



of Calcutta and Madras and the Recorder's Court at Bombay, to give to insolvent-debtors in India the relief contemplated by what is called the Lord Act, passed in 1759.

Insolvent Courts in British India were first established under 9, Geo. IV, C. 73, in 1829. They had a distinct and separate existence, although they were presided by a Judge of the Supreme Courts. They could examine parties and witnesses on oath, impose fines, commit to gaol for contempt, but could not award costs except under the Supreme Court rules. The Act was to be in force for four years only—the duration, however, was extended by subsequent enactments to 1848. XI Vic. C. 21, passed in 1848, continued the Courts and consolidated and amended the law relating to insolvent debtors in India.

No such courts exist in the Mofussil. Some provinces, however, on the subject are to be found in the Civil Code of Punjab, and Major Spark's Code which has some force in parts of British Burmah and in Section 271, Act VIII of 1859.

In 1800, the Crown was empowered by 39 and 40, Geo. III, C. 79, Section 25, to issue a commission for the High Court of Admiralty, and to nominate all or any of the Judges at the Presidency towns in India to be Commissioners for the trial and adjudication of prize causes and other maritime questions arising in India.

Under 2, Wm. IV, an appeal was allowed to the High Court of Admiralty in certain cases. A separate Vice-admiralty Court was established in Calcutta in 1800. The Charter of 1865 defines the jurisdiction of the High Court in prize causes.

Under Act IV of 1860, the High Courts in British India were constituted Courts of Divorce for the professing a Christian religion.

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Act I of 1863 there were established six grades of Courts exclusive of the Recorder's and the Small Cause Courts. The three lowest grades of courts were presided over by extra assistants of the third, second, and first class, then there was the Court of the Assistant Commissioner who had the same jurisdiction as the extra assistant of the 1st class. Above these were the Courts of the Deputy Commissioner, the Commissioner and the Chief Commissioner. The Act extended to British Burmah, generally Act VIII and Act XIV of 1859.

By Act XXI of 1863 there was established at Rangoon and Moulmein a Court presided over by a barrister of five years' standing or more, appointed by the Governor-General in Council, called the Recorder. He exercised civil and criminal jurisdiction. The Procedure of his Court was regulated by Act VIII of 1859, and he admitted the law which prevailed in the ordinary original side of the High Court. An appeal lay from his decrees to the Privy Council in all cases of the value of Rs. 10,000 and upwards and to the High Court of Bengal in cases between the value of Rs. 3,000 and 10,000. The Recorder could only commit to the Bengal High Court any European British subject charged with an offence punishable with death. The Registrar of the Court exercised the powers of a judge of a Small Cause Court in certain suits under the value of Rs. 200. His powers were increased under Act III of 1866.

By Act VII of 1872, a Judicial Commissioner was appointed to be head of the judicial system in that province. A judge of Rangoon was appointed in lieu of the Recorder, and a Small Cause Court with the powers of a sessions judge was appointed in lieu of the Recorder of Moulmein.

Under Act XIV of 1863 there are eight grades of courts in the Central Provinces in addition to the Small Cause Court. The lowest court is that of the Tehsildar of the second class, the pecuniary limit of whose jurisdiction is rupees 100; next is the Tehsildar of the first class with jurisdiction up to Rs. 300, next are



the Assistant Commissioners of the third class, second class, and first class; with jurisdiction up to Rs. 500, 1,000 and 5,000 respectively. Above there is the Deputy Commissioner, who exercises unlimited pecuniary jurisdiction and has power to hear appeals for the decision and order of the Courts of the last four grades; and then comes the Commissioner who exercises appellate jurisdiction over his Assistant and Deputies, and is in his turn subject to the appellate jurisdiction of the Judicial Commissioner.

In the Jhansi Division there are seven grades of Courts established by Act XVIII of 1867, similar to those in the Central Provinces. There are, however, no Assistant Commissioners of the third class, and the presence of a Judicial Commissioner is rendered unnecessary by the High Court at Allahabad.

By Act XIX of 1865 there were established seven grades of Courts in the Punjab similar to those in the Central Provinces. By Act IV of 1866 a Chief Court was established in lieu of the Judicial Commissioner.

Act XIV of 1865 did not work well in Oude, therefore the Oudh Civil Court, Act No. XXXII of 1871, was passed with special reference to the requirements of that province. It constitutes five grades of Courts: 1st, the Judicial Commissioners; 2nd, the Commissioners; 3rd, the Deputy Commissioners or the Civil Judges; 4th, the Assistant or the extra-Assistant Commissioners; 5th the Tehsildars. The Court of the Deputy Commissioner is the Principal Civil Court of original jurisdiction in any district. He entertains appeals from the Courts of the fourth and fifth grade except where the amount in dispute exceeds 1,000 Rs., in which case the appeal lies to the Commissioner. The Commissioner exercises a general control over the Courts of the first three grades and receives appeals from the decision of the Deputy Commissioner. Appeals from his decrees or orders lie to the Judicial Commissioner, who is empowered in doubtful cases to make a reference to the High Court North-Western Provinces.

Courts were established in Scind by Act XII of 1861 (Bombay Code); at Aden by Act XI, of 1864, and in Coorg by Act XXV of 1868.

The law which regulates the constitution of the Bombay Courts, is Act XIV of 1869, and that which governs that of the Courts in the Lower and North-Western Provinces of the Bengal Presidency, is to be found in Act VI of 1871.

The Small Cause Courts in Presidency towns, as they now exist, were established under Act IX of 1850. The pecuniary limit of their jurisdiction was raised to Rs. 1,000 under Act XXVI of 1864. Mofussil Small Cause Courts were established in 1860, and the law relating to them was consolidated and amended by Act XI of 1865.

Lecture XII, which treats of the inferior criminal courts, concludes the work. In it the learned Professor gives a general summary of Act X of 1872, which we do not think it necessary to reproduce for the benefit of our readers.

Act V of 1861 remains as the basis upon which the general law on Police administration outside the Presidency towns rests, modified as far as Bengal is concerned by Act VI of 1838 Bengal Council.

Act VIII of 1867—Bombay regulates the Police in the Mofussil in that presidency as Act XXIV of 1859 amended by a local Act, namely, No. 5 of 1865, does for the Mofussil in the Presidency of Madras. With regard to the three Presidency towns, the Police administration was provided for by Acts XIII of 1856 and XLVIII of 1868, which still remain for the town of Bombay.

Calcutta Police is governed by Act IV of 1866, as that of the town of Madras is governed by the local Act of 1867. In respect of the rural police in the N. W. Provinces, Act II of 1869 law.

The law relating to the justices and Peace was consolidated in Act II of 1869, a great number of amendments were submitted in 15 days for execution in the Provinces, and for Oude, and for that.

332. In inquiries and trials (other than summary trials) under this Act, the evidence of the witnesses shall be recorded by the Magistrate or Sessions Judge, as the case may be, in the following manner :

333. In summons cases tried before Magistrates, and in cases of the kind referred to in section two hundred and twenty-two when tried by a Magistrate of the 1st or 2nd class, otherwise than at a summary trial, the Magistrate shall make a memorandum of the substance of the evidence of each witness, as the examination of the witness proceeds.

Such memorandum shall be written and signed by the Magistrate with his own hand, and shall form part of the record.

If the Magistrate is prevented from making a memorandum as above required, he shall record the reason of his inability to do so, and shall cause such memorandum to be made in writing from his dictation in open Court, and shall sign the same ; and such memorandum shall form part of the record.

334. In all other cases before Magistrates and in all proceedings before Courts of Session, the evidence of each witness shall be taken down in writing in the language in ordinary use in the district in which the Court is held, by or in the presence and hearing and under the personal direction and superintendence of the Magistrate or Sessions Judge, and shall be signed by the Magistrate or Sessions Judge.

When the evidence of a witness is given in English, the Magistrate or Sessions Judge may take it down in that language of his own hand ; and an authenticated copy of the same, in the language in ordinary use in the district in which the cases shall be tried, shall be a part of the record.

When the evidence of a witness is given in any language other than English, the Magistrate or Sessions Judge may take it down in that language of his own hand ; and an authenticated copy of the same, in the language in ordinary use in the district in which the cases shall be tried, shall be a part of the record.

When the evidence of a witness is given in any language other than English, the Magistrate or Sessions Judge may take it down in that language of his own hand ; and an authenticated copy of the same, in the language in ordinary use in the district in which the cases shall be tried, shall be a part of the record.

In cases in which the evidence is not taken down in writing by the Magistrate or Sessions Judge, he shall, as the examination of each witness proceeds, make a memorandum of the substance of what such witness deposes and such memorandum shall be written and signed by the Magistrate or Sessions Judge, with his own hand, and shall form part of the record.

If the Magistrate or Sessions Judge is prevented from making a memorandum as above required, he shall record the reason of his inability to do so.

335. The Local Government may direct that in any district or part of a district, or in proceedings before any Court of Session, or before any Magistrate or class of Magistrates, the evidence of complainants or witnesses shall be taken down by the Sessions Judge or Magistrate with his own hand in the vernacular language of the Sessions Judge or Magistrate, unless the Sessions Judge or Magistrate be prevented by any sufficient reason from taking down the evidence of any complainant or witnesses, in which case he shall record the reason of his inability to do so, and shall cause the evidence to be taken down in writing from his dictation in open Court.

The evidence so taken down shall be signed by the Sessions Judge or Magistrate, and shall form part of the record :

Provided that, if the vernacular language of the Sessions Judge or Magistrate be not English or the language in ordinary use in the district in which the Court is held, the Local Government may direct him to take down the evidence in the English language, or in the language in ordinary use in the district in which the Court is held, instead of his own vernacular.

336. In cases of the kind referred to in section three hundred and thirty-three, tried before Magistrates, the Magistrate may, if he thinks fit, take down the evidence of any witness in the manner provided in section three hundred and thirty-four, or, if, within the jurisdiction of such Magistrate, the

Local Government has made the order referred to in section three hundred and thirty-five, in the manner provided in section three hundred and thirty-five.

**337.** The Local Government may determine what, for the purposes of this Act, shall be held to be the language in ordinary use in any district in which a Court is held.

Local Government to decide what language is to be held to be in ordinary use.

**338.** The evidence taken under section three hundred and thirty-four shall not ordinarily be taken down in the form of question and answer, but in the form of a narrative.

Form of record of evidence.

It shall be in the discretion of the Magistrate or Sessions Judge to take down, or cause to be taken down, any particular question and answer, if there appears any special reason for so doing, or if any person who is a prosecutor or a person accused, or his Counsel or agent, requires it.

**339.** As the evidence of each witness, taken under section three hundred and thirty-four, is completed, it shall be read over to the witness in the presence of the accused person, if in attendance, or of his agent, when his personal attendance is dispensed with, and he appears by agent, and shall, if necessary, be corrected.

If the witness deny the correctness of any part of the evidence when the same is read over to him, the Magistrate or Sessions Judge may, instead of correcting the evidence, make a memorandum thereon of the objection made to it by the witness, and shall add such remarks as he thinks necessary.

If the evidence be taken down in a language different from that in which it has been given, and the witness does not understand the language in which it is taken down, the witness may require his evidence as taken down to be interpreted to him in the language in which it was given, or in a language which he understands.

**340.** In all cases whatever, when the evidence is given in a language not understood by the accused person, it shall be interpreted to him in open Court in a language understood by him, where he is present in person.

Interpretation of evidence to accused or his agent.

If he appears by agent, and the evidence is given in a language other than the language in ordinary use in the district in which the Court is held, it shall be interpreted to such agent in that language.

In cases in which documents are put in for the purpose of formal proof, it shall be in the discretion of the Court to interpret as much thereof as appears necessary.

**341.** Every Sessions Judge or Magistrate recording the evidence of a witness shall record such remarks as he thinks material respecting the demeanour of such witness whilst under examination.

Remarks respecting demeanour of witness.

#### OF THE EXAMINATION OF ACCUSED PERSONS.

**342.** In all inquiries and trials a Criminal Court may from time to time and at any stage of the proceedings,

Accused may be questioned.

put any questions to the accused person which such Court may think proper.

**343.** The accused person shall not be liable to any punishment for refusing to answer, or for answering falsely, questions asked under section three hundred and forty-two, but the Court shall draw such inferences as seems just from such refusal.

Accused not punishable for refusal to answer.

**344.** Except as is provided in section three hundred and forty-seven, no influence, by means of any promise or threat or otherwise, shall be used to the accused person to induce him to disclose or withhold any matter within his knowledge.

No influence to be used to induce disclosures.

**345.** No oath or affirmation shall be administered to the accused person.

Accused not to be sworn.

**346.** Whenever an accused person examined by the Court, the whole or any part of his examination shall be recorded in writing, and every answer given by him, in full, and shall be shown to him, and he shall be at liberty to correct it with his answers.

Examination of accused how recorded.

When the whole or any part of his examination shall be recorded in writing, and every answer given by him, in full, and shall be shown to him, and he shall be at liberty to correct it with his answers.

his presence and in his hearing, and contains accurately the whole of the statement made by the accused person.

In cases in which the examination of the accused person is not recorded by the Magistrate or Sessions Judge himself, he shall be bound, as the examination proceeds, to make a memorandum thereof in the vernacular of the district, or in English, if he is sufficiently acquainted with that language; and such memorandum shall be written and signed by the Magistrate or Sessions Judge with his own hand, and shall be annexed to the record. If the Magistrate or Sessions Judge is precluded from making a memorandum as above required, he shall record the reason of his inability to do so.

The accused person shall sign or attest by his mark such record.

If the examination be taken in the course of a preliminary inquiry, and the Court of Session find that the provisions of this section have not been fully complied with, it shall take evidence that the prisoner duly made the statement recorded: Provided that if the error does not prejudice the prisoner, it shall not be deemed to affect the admissibility of the statement so recorded.

347. The Magistrate of the District, any Magistrate of the 1st class inquiring into the case, or with the sanction of the Magistrate of the District, any Magistrate duly empowered to commit to the Court of Session, may, after recording his reason for so doing, tender a pardon to any one or more of the persons supposed to have been directly or indirectly concerned in or privy to any offence specified in column seven of the fourth schedule hereto annexed as triable exclusively by the Court of Session, on condition of his or their making a full, true and fair disclosure of the whole of the circumstances, within his Session knowledge, relative to the crime the Mag. and every other person concerned (F) given a tender thereof. or to the accepting a tender of pardon when called on, shall be examined as a witness under the rules applicable to evidence as the case witnesses.

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Detention in custody in case of refusal to attend or to execute recognisance.

person, is precluded from trying the case himself.

348. The High Court as a Court of revision, and the Court of Session after committal but before the commencement of a trial, may, with the view of obtaining on the trial the evidence of any person or persons supposed to have been directly or indirectly concerned in or privy to any such offence, instruct the committing Magistrate to tender a pardon on the same condition to such person or persons.

The Court of Session, in like manner and on the same condition, may, at any time before judgment is passed, with the view of obtaining on the trial the evidence of any person or persons supposed to have been directly or indirectly concerned in or privy to any such offence, tender a pardon to such person or persons.

349. When a pardon has been tendered under section three hundred and forty-seven or section three hundred and forty-eight, if it appears to the Magistrate before the trial, or to the Court of Session before judgment has been passed, or to the High Court as a Court of reference or revision, that any person, who has accepted such offer of pardon, has not conformed to the conditions under which the pardon was tendered, either by wilfully concealing anything essential, or by giving false evidence, such Magistrate or Court may commit or direct the commitment of such person for trial for the offence in respect of which the pardon was so tendered.

The statement made by a person under pardon, which pardon has been withdrawn under this section, may be put in evidence against him.

## CHAPTER XXVI.

### OF SECURING THE ATTENDANCE OF WITNESSES.

350. The following procedure shall be pursued in order to obtain the attendance of witnesses before a Magistrate or Criminal Court.

Procedure for obtaining attendance of witnesses.

351. Any Court or Magistrate may, at any stage of any proceeding, inquiry or trial, summon, in the manner provided by Chapter XII, any witness, or examine any person in attendance though not summoned as a witness, and it shall be its or his duty to do so if the evidence of such person appears essential to the just decision of the case.

352. If a Court or Magistrate has reason to believe that any witness, whose attendance is required, will not attend to give evidence without being compelled to do so, it or he may, instead of issuing a summons, issue a warrant of arrest in the first instance.

353. If such warrant cannot be executed and the Court or Magistrate considers that the witness absconds or conceals himself for the purpose of avoiding the service thereof, it or he may issue a proclamation, requiring the attendance of such witness to give evidence at a time and place to be named therein, to be affixed on some conspicuous part of such witness's ordinary place of abode.

If the witness does not attend at the time and place named in such proclamation, the Court or Magistrate may order the attachment of any movable property belonging to such witness to such amount as seems reasonable, not being in excess of the amount of costs of attachment and of any fine to which the witness may be liable under the provisions of the following section.

Such order shall authorize the attachment of any movable property within the jurisdiction of the Court or Magistrate by whom it was made; and it shall authorize the attachment of any movable property without the jurisdiction of the said Court or Magistrate, when endorsed by the Magistrate of the District in which such property is situated.

354. If the witness appears and satisfies such Court or Magistrate that he did not abscond or conceal himself for the purpose of avoiding the execution of the warrant, and that he had not notice of the proclamation in time to attend at the time and place named therein, the Court or Magistrate shall direct that the property be released from

attachment, and shall make such order in regard to the costs of the attachment as to such Court or Magistrate seems fit.

If such witness does not appear, or appearing, fails to satisfy the Court or Magistrate that he did not abscond or conceal himself for the purpose of avoiding the execution of the warrant, and that he had not such notice of the proclamation as aforesaid, the Court or Magistrate may order the property attached, or any part thereof, to be sold for the purpose of satisfying all costs incurred in consequence of such attachment, together with the amount of any fine which may be imposed upon such witness under the provisions of section one hundred and seventy-two of the Indian Penal Code.

If the witness pays to such Court or Magistrate the costs and fine as aforesaid, his property shall be released from attachment.

355. If any person summoned to give evidence neglects or refuses to appear at the time and place appointed by the summons, and no reasonable excuse is offered for such neglect or refusal, the Court or Magistrate, upon proof of the summons having been duly served, may issue a warrant under his hand and seal, to bring such person before him to testify as aforesaid.

356. If any person summoned or brought before a Magistrate refuses to answer such questions as are put to him, without offering any reasonable excuse for such refusal, such Magistrate may, by warrant under his hand and seal, commit him to custody for any term not exceeding seven days, unless in the meantime such person consents to be examined and to answer; after which event of his persisting in his refusal, he shall be dealt with according to the provisions of sections four hundred and thirty-four, four hundred and thirty-five, and four hundred and thirty-six.

INQUIRIES with justices and 357. In inquiries preliminary or H. J. submitted in- tation al for Oude to in cases usually tried for that as

shall be in his discretion to summon any witness offered on behalf of the accused person to answer or disprove the evidence against him. If the Magistrate refuses to summon a witness so offered he shall record his reasons for such refusal.

Power to summon supplementary witnesses.  
The Magistrate may summon and examine supplementary witnesses after commitment and before the commencement of the trial, and bind them over to appear and give evidence. Such examination shall, if possible, be taken in the presence of the accused person, and, in every case, a copy of the examination of such witnesses shall be given him free of cost.

When accused person is to be committed.  
358. In such inquiries, when the person accused is to be committed for trial and has given in the list of witnesses mentioned in section two hundred, the Magistrate shall summon the witnesses to appear before the Court before which the accused person is to be tried.

Refusal to summon unnecessary witness, unless deposit made.  
359. If the Magistrate thinks that any witness is included in the list for the purpose of vexation or delay or of defeating the ends of justice, he may require the accused person to satisfy him that there are reasonable grounds for believing that such witness is material.

If the Magistrate be not so satisfied, he shall not be bound to summon the witness; but, in doubtful cases, he may summon such witness, if such a sum is deposited with the Magistrate as he thinks necessary to defray the expense of obtaining the attendance of the witness.

Recognizances of prosecutors and witnesses.  
360. Prosecutors and witnesses for the prosecution and defence, whose attendance is necessary before the Court of Session or High Court shall execute before the Magistrate recognizances, in the Form (F) given in the second schedule to this Act, or to the like effect, to be in attendance when called upon at the Court of Session or High Court, to prosecute or to give evidence as the case may be.

Detention in custody in case of refusal to attend or to execute recognizance.  
If any prosecutor or witness refuses to attend before the Court of Session or High Court, or to execute the recognizance above directed, the Magistrate may detain him in cus-

tody, until he executes such recognizance, or until the time when his attendance at the Court of Session or High Court is required, when the Magistrate shall send him under custody to the Court of Session or High Court.

#### SUMMONS CASES.

361. In summons cases, the Magistrate may summon any person who appears to him likely to give material evidence on behalf of the complainant or the accused.

Ordinarily it shall be the duty of the complainant and accused, in non-cognizable cases, to produce their own witnesses.

In such cases it shall be in the discretion of the Magistrate to summon any witnesses named by the complainant or the accused; and he may require, in such cases, a deposit of the expenses of a witness before summoning him.

#### WARRANT CASES.

In cases tried upon warrant.  
362. In warrant cases, the Magistrate shall ascertain from the complainant, or otherwise, the names of any persons who may be acquainted with the facts and circumstances of the case, and who are likely to give evidence for the prosecution, and shall summon such of them to give evidence before him as he thinks necessary.

The Magistrate shall also, subject to the provisions of section three hundred and fifty-nine, summon any witness and examine any evidence that may be offered in behalf of the accused person to answer or disprove the evidence against him, and may for that purpose, at his discretion, adjourn the trial from time to time. If the Magistrate refuse to summon a witness named by the accused person, he shall record his reasons for such refusal, and the accused person shall be entitled to appeal to the Court of Session against such refusal.

#### SESSIONS TRIALS.

Right of accused as to examination and summoning of witness.  
363. The accused person shall be allowed to examine any witness not previously named by him, if such witness be in attendance; but he shall not, except as provided in section four hundred and forty-eight, be entitled of right to have any



witness summoned other than the witnesses named in the list delivered to the Magistrate by whom he was committed or held to bail for trial.

364. If a witness before a Court of Session refuses to answer any question which is put to him, and does not offer any just excuse for such refusal, the Court may commit him to custody for such reasonable time as it deems proper, unless in the meantime he consents to be examined and to answer.

In the event of such witness persisting in his refusal, he may be dealt with according to the provisions of section four hundred and thirty-five or four hundred and thirty-six.

#### OF SECURING DOCUMENTARY EVIDENCE.

365. Whenever an officer in charge of a Police-station or any Court considers that the production of any document is necessary or desirable for the purposes of any investigation or judicial proceeding, such officer or Court may issue a summons to the party, in whose keeping such document is believed to be, requiring him to attend and produce such document at the time and place stated in the summons.

366. If there appears reason to believe that the person, to whom the summons is addressed, will not produce it as directed in the summons, such officer or Court may issue a search-warrant for the document in the first instance.

367. Any Court may, if it thinks fit impound any document produced before it, or may, at the conclusion of the proceedings, order such document to be returned to the person who produced it.

### CHAPTER XXVII.

#### OF SEARCH-WARRANTS.

368. When a Magistrate considers that the production of anything is essential to the conduct of an inquiry into an offence known or suspected to have been committed, or to the discovery of the offender,

or when he considers that such inquiry or discovery will be furthered by the search or inspection of any house or place,

he may grant his search-warrant; and the officer charged with the execution of such warrant may search or inspect any house or place within the jurisdiction of the Magistrate of the District.

The Magistrate, issuing such warrant, may, if he see fit, specify in his warrant the house or place, or part thereof, to which only the search or inspection shall extend; and the officer, charged with the execution of such warrant, shall then search or inspect only the house, place, or part so specified.

369. The last preceding section shall not authorize any Magistrate, to grant a search-warrant for a letter in the custody of the Postal Department ;

but if any such letter is wanted for the purpose of any criminal proceeding, any Magistrate, or District Superintendent of Police may give notice to the Postal authorities to cause search to be made for and to detain any such letter, pending the orders of the Magistrate of the District; and the Magistrate of the District may, if he thinks fit, direct the Postal authorities to deliver up any such letter.

370. A search-warrant shall ordinarily be directed to a Police officer; but the Magistrate issuing the warrant may, after recording his reasons, if immediate search is necessary and no Police officer be immediately available, direct it to any other person.

371. A search-warrant directed or endorsed to a Police officer may, if he is not able to proceed in person, be executed by any other Police officer.

In such case the name of such Police officer shall be endorsed upon the warrant by the officer to whom it is directed or endorsed.

372. When it is necessary for a search-warrant to be executed out of the District in which it was issued, any Magistrate, within whose local jurisdiction the warrant is to be executed, shall endorse his name thereon.



Such endorsement shall be sufficient authority for the Police officer charged with the execution of the warrant to execute the same within the said jurisdiction.

Or the search-warrant may be directed to the Magistrate, within whose local jurisdiction the search is to be made; and he shall thereupon endorse his name on such warrant and enforce its execution in the same manner as if it had been issued by himself.

373. Whenever there is reason to believe that the delay, occasioned

Search-warrants may in emergency be executed without endorsement.

by obtaining the endorsement of the Magistrate in whose District the warrant is to be executed, will prevent the discovery of the thing for which search is to be made, the Police officer charged with the execution of the warrant may execute the same in any place beyond the District in which it was issued without the endorsement of the Magistrate in whose local jurisdiction that place is situate.

If the thing, for which search is made, is found in such place, it shall, when the place where the thing is found is nearer to the Magistrate having jurisdiction in such place than to the Magistrate who issued the warrant, be immediately taken before the Magistrate in whose local jurisdiction it is found; and unless there be good

cause to the contrary, such Magistrate shall make an order authorizing it to be taken to the Magistrate who issued the warrant.

If the thing be not found after such search, the Police officer making the same shall, in addition to the return made to the Magistrate who issued the warrant, report the fact to the Magistrate in whose local jurisdiction the search was made.

374. If the thing searched for be found within a Presidency town, it shall be taken to the Commissioner or Police or to a Police Magistrate; and such Commissioner or Magistrate shall act in the manner prescribed in section three hundred and seventy-three.

375. Whenever it appears necessary, a Magistrate may, by his warrant, order search to be made in a place, out of his jurisdiction, and may direct that the warrant be executed

Magistrate may issue search-warrant to be executed in jurisdiction of another Magistrate.

either after or without obtaining the endorsement of the Magistrate within whose jurisdiction the search is to be made.

When a Magistrate issues a warrant under this section, he shall inform the Magistrate within whose local jurisdiction the house or place to be searched is situate, or if the house or place be situate within a Presidency town he shall inform the Commissioner of Police of the issue of such warrant.

376. A Magistrate issuing a search-warrant to be executed in any house or place out of the jurisdiction of the Magistrate of the District, or out of his own division, may direct the warrant to any Magistrate within whose local jurisdiction such house or place is situate, and may send the same by post.

On receipt of such warrant, by the Magistrate to whom it is directed, he shall endorse his name thereon and enforce its execution in the same manner as if it had been originally issued by himself.

If the warrant is to be executed within a Presidency town it shall be addressed to the Commissioner of Police or to a Police Magistrate.

In such case any property found on search made may be dealt with as provided in sections three hundred and seventy-three and three hundred and seventy-four.

377. If the Magistrate of the District, or a Magistrate of a division of a District, or a Magistrate of the first class, upon information and after such inquiry as he thinks necessary, has reason to believe that any house or place is used as a place for the deposit or sale of stolen property,

or for the deposit or sale or manufacture of forged documents, or counterfeit Government stamps, or counterfeit coin, or instruments or materials for counterfeiting coin or for forging,

or that any forged documents, or counterfeit stamps, or false seals, or counterfeit coin, or instruments or materials used for counterfeiting coin, or for forging, are kept or deposited in any house or place,

he may by his warrant authorize any Police officer above the rank of a constable

to search for and seize any such documents, stamps, seals, coin, or instruments or materials, and to bring the same before the Magistrate who issued the warrant.

378. Whenever it appears necessary, a Magistrate may, by his warrant, order search to be made in a place, out of his jurisdiction, and may direct that the warrant be executed

to enter, with such assistance as may be required, and by force, if necessary, any such house or place, and to search all such parts of the same as are specified in the warrant, and to seize and take possession of any property, documents, stamps, seals, or coins, therein found, which he reasonably suspects to be stolen, forged, false, or counterfeit, and also of any such instruments and materials as aforesaid.

378. The Magistrate, by whom a search-warrant issued, may attend personally for the purpose of seeing that the warrant is duly executed.

The Magistrate may also direct a search to be made in his presence, of any house or place for the search of which he is competent to issue a search-warrant.

379. Whenever an officer in charge of a Police-station, or a Police officer making an investigation, considers that the production of anything is necessary to the conduct of an investigation into any offence which he is authorized to investigate, he may search or cause search to be made for the same, in any house or place within the limits of the station of which he is in charge or to which he is attached.

In such case, the officer in charge of the Police-station or Police officer making investigation shall, if practicable, conduct the search in person.

If he is unable to conduct the search in person, and there is no other person competent to make the search present at the time, the officer in charge of the Police-station, or Police officer making investigation, may require any officer subordinate to him to make the search; and he shall deliver to such subordinate officer an order in writing, specifying the property for which search is to be made and the house or place to be searched, and such subordinate officer may thereupon search for such property in such house or place.

The provisions of sections three hundred and eighty-two to three hundred and eighty-five (both inclusive), relating to search-warrants, shall be applicable to a search made, under this section, by or under the direction of an officer in charge of a Police-station, or by a Police officer making an investigation.

380. An officer in charge of a Police-station may require an officer in charge of another Police-station, whether subordinate to the same Magistrate as himself or to a Magistrate of another District, to cause a search to be made in any house or place in any case in which the former officer might cause such search to be made within the limits of his own station.

Such officer, on being so required, shall proceed according to the provisions of section three hundred and seventy-nine, and shall forward the thing found, if any, to the officer at whose request the search was made.

381. An officer in charge of a Police-station may, without a warrant, enter any shop or premises within the limits of such station for the purpose of inspecting or searching for any weights or measures or instruments for weighing used or kept therein, whenever he has reason to believe that there are in such shop or premises any weights, measures, or instruments for weighing which are false.

If such officer finds in such shop or premises any weights, measures, or instruments that are false, he may seize the same, and shall forthwith give information of such seizure to the Magistrate having jurisdiction.

382. Whenever any house or place liable to search or inspection, under this chapter, is closed, any person residing in or being in charge of such house or place shall, on demand of the officer or other person executing the warrant, allow such officer or other person free ingress thereto, and afford all reasonable facilities for a search therein.

383. A Police officer, or other person authorized by a warrant to search any house or place, may break open any outer or inner door or window of such house or place, in order to execute the warrant, if, after notification of his authority and purpose and demand of admittance duly made, he cannot otherwise obtain admittance.

384. If the place ordered to be searched is an apartment in the actual occupancy of a woman, who, according to the customs of the country, does not appear in public,

the officer or other person charged with the execution of the warrant shall give notice to such woman in such apartment, not being a woman against whom a warrant of arrest has been issued, that she is at liberty to withdraw.

After giving such notice and allowing a reasonable time for such woman to withdraw, and affording her every reasonable facility for withdrawing, such officer or person may enter such apartment for the purpose of completing the search, using at the same time every precaution consistent with these provisions for preventing the clandestine removal of property.

385. Before conducting a search under this chapter, the officer conducting it shall call upon two or more respectable inhabitants of the place in which the house or place to be searched is situate, to attend and witness the search.

The search shall be made in their presence, but they shall not be required to attend the Court of the Magistrate as witnesses, unless specially summoned by him.

The occupant of the house or place searched, or some person in his behalf, shall, in every instance, be permitted to attend during the search.

386. Whenever it is necessary to cause a woman to be searched, the search shall be conducted with strict regard to the habits and customs of the country.

387. Whenever a person is arrested by the Police under a warrant which does not provide for the taking of bail,

or under a warrant which provides for the taking of bail, but the arrested person cannot furnish bail,

or is arrested without warrant and is not admitted to bail,

it shall be the duty of the arresting officer to search such person and to place in safe custody all articles, other than necessary articles of apparel, found on such person.

A list of such articles shall be forwarded with the daily diary or with the final report in the case.

## PART IX.

### PROCEDURE INCIDENTAL TO INQUIRY AND TRIAL.

#### CHAPTER XXVIII.

##### BAIL.

388. When any person appears or is brought before a Magistrate accused of any bailable offence, he shall be admitted to bail.

389. When any person, accused of any non-bailable offence, appears or is brought before a Magistrate, such person shall not be admitted to bail, if there appear reasonable grounds for believing that he has been guilty of the offence of which he is accused.

If the evidence, given in support of the accusation, is, in the opinion of the Magistrate, not such as to raise a strong presumption of the guilt of the accused person,

or if such evidence is adduced on behalf of the accused person as, in the opinion of the Magistrate, weakens the presumption of his guilt, but there appears to the Magistrate in either of such cases to be sufficient ground for further inquiry into his guilt, the accused person shall be admitted to bail pending such inquiry.

390. The Court of Session may in any case, whether there be an appeal on conviction or not, direct that an accused person shall be admitted to bail, or that the bail required by a Magistrate be reduced.

391. When a Magistrate admits to bail any person accused or suspected of any offence, a recognizance, in such sum of money as the Magistrate thinks sufficient, shall be entered into by the person so accused and one or more sureties, conditioned that such person shall attend at the time and place mentioned in the recognizance and shall continue to attend until otherwise directed by the Court, and, if required, shall appear when called upon at the Court of Session or other Court, as the case may be, to answer the charge.

392. If through mistake or fraud insufficient bail has been taken, or if the sureties become afterwards insufficient, the accused person may be ordered by the Magistrate to give sufficient bail or to find sufficient sureties and, in default, may be committed to prison.

393. If the accused person cannot find sureties when called upon, he shall be admitted to bail upon finding the same at any time afterwards before conviction.

394. After the recognizances have been duly entered into, the Magistrate, in case the accused person has appeared voluntarily or is in the custody of some officer, shall thereupon release him; and in case he is in some prison or other place of confinement, shall issue a warrant of release to the jailor or other person having him in his custody, and such jailor or other person shall thereupon release him.

395. Any one or more of the sureties for an accused person may, at any time, apply to the Magistrate to be discharged from their engagements.

On such an application being made, the Magistrate shall issue his warrant of arrest, directing that such person be brought before him.

On the appearance of such person pursuant to the warrant, or on his voluntary surrender, the Magistrate shall direct the recognizances of the sureties to be discharged, and shall call upon such person to find other sureties, and in default, may order him to be committed to prison.

396. Whenever, by reason of default of appearance of the person executing the personal recognizance, the Magistrate is of opinion that proceedings should be had to compel payment of the penalty mentioned in the recognizance, he shall proceed to enforce the penalty by issuing a warrant for the attachment and sale of the movable property belonging to such person, which may be found within the jurisdiction of the Magistrate of the District. Such warrant may be executed within the jurisdiction of the Magistrate of the District, and it shall authorize the distress and sale of any movable

property belonging to the accused person without the jurisdiction of the said Magistrate when endorsed by the Magistrate of the District in which such movable property is situated.

397. Whenever, by reason of default of appearance by the person bailed, the Magistrate is of opinion that proceedings should be had to compel payment of the penalty mentioned in the recognizance of the surety or sureties, he shall give notice to the surety or sureties to pay the same, or to show cause why it should not be paid.

If such penalty be not paid and if no sufficient cause for its non-payment be shown, the Magistrate shall proceed to recover the penalty from such surety or sureties by issuing a warrant for the attachment and sale of any movable property belonging to him or them which may be found within the jurisdiction of the Magistrate of the District.

Such warrant may be executed within the jurisdiction of the Magistrate of the District; and it shall authorize the distress and sale of any movable property belonging to the surety or sureties without the jurisdiction of the said Magistrate when endorsed by the Magistrate of the District in which such movable property is situated.

If such penalty be not paid and cannot be recovered by such attachment and sale, such surety or sureties shall be liable to confinement, by order of the Magistrate, in the Civil jail, during a period not exceeding six months.

398. The powers given by sections three hundred and ninety-six and

In what cases the powers given by sections 396 and 397 may be exercised.

three hundred and ninety-seven may be exercised by every Criminal Court in every case in which a personal recognizance or bail has been given for the appearance of a party or witness, if default is made by the non-appearance of such party or witness before such Court according to the conditions of such recognizance or bail:

Provided that the Magistrate or Court may, at his or its discretion, remit any portion of the penalty mentioned in the recognizance of the accused person or of the surety or sureties, and enforce payment in part only:

Remission of part of penalty.

All orders passed by any Magistrate, other than the Magistrate of the District, under this section or section three hundred and ninety-six or three hundred and ninety-seven, shall be appealable to the Magistrate of the District, or, if not so appealed, may be revised by him.

A High Court or a Court of Session may direct any Magistrate to levy the amount due on a forfeited bail-bond executed in respect of attendance before such High Court or Court of Session.

399. When any person is required by any officer or Criminal Court to give bail, except in cases coming under Ch. XXXVIII, such officer or Court may permit such person to deposit a sum of money or Government promissory notes to such amount as it may fix in lieu of such bail.

## CHAPTER XXIX.

### FORMATION OF LISTS OF JURORS AND ASSESSORS AND THEIR ATTENDANCE.

400. The Sessions Judge and the Collector of the District, or such other officer as the Local Government from time to time appoints in this behalf, shall prepare and make out in alphabetical order a list of persons residing within ten miles from the place where trials before the Court of Session are held, or within such other distance as the Local Government thinks fit to direct, who are, in the judgment of the Sessions Judge and Collector or other officer as aforesaid, qualified from their education and character to serve as jurors or as assessors, respectively.

The list shall contain the name, place of abode, and quality or business of every such person; and if the person is a European or an American, the list shall mention the race to which he belongs.

401. Copies of such list shall be stuck up in the office of the Collector or other officer as aforesaid and in the Court-houses of the Magistrate of the District and of the Chief Civil Court, and in some conspicuous place in the town or towns near or in the vicinity of which the persons named in the list reside.

To every such copy shall be subjoined a notice, stating that objections to the list will be heard and determined by the Sessions Judge and Collector or other officer as aforesaid at the Sessions Court-house, and at a time to be mentioned in the notice.

402. For the hearing of such objections the Sessions Judge shall sit with the Collector or other officer as aforesaid, and shall, at the time and place mentioned in the notice, revise the list and hear the objections (if any, of persons interested in the amendment thereof, and shall strike out the name of any person not suitable in their judgment to serve as a juror or as an assessor, or who may avail himself of the exemption from service given by section four hundred and six, and insert the name of any person omitted from the list whom they deem qualified for such service.

In the event of a difference of opinion between the Collector or other officer as aforesaid and the Sessions Judge, the name of the proposed juror or assessor shall be omitted from the list.

A copy of the revised list shall be signed by the Sessions Judge and Collector or other officer as aforesaid and sent to the Court of Session.

Any order of the Sessions Judge and Collector or other officer as aforesaid in preparing and revising the list shall be final.

403. The list so prepared and revised shall be again revised once in every year.

The list so revised shall be deemed a new list and shall be subject to all the rules hereinbefore contained as to the list originally prepared.

404. All male persons between the ages of twenty-one and sixty, resident within the local limits of the jurisdiction of the Court of Session, except those hereinafter mentioned, shall be deemed capable of serving as jurors and assessors, and shall be liable to be summoned accordingly.

405. The following persons are incapable of serving as jurors or as assessors, namely:  
Persons who hold any office in or under the said Court.  
Persons executing any duties of Police or entrusted with any Police functions.

Persons who have been convicted of any offence against the State, or of any fraudulent or other offence which, in the judgment of the Sessions Judge and Collector, renders them unfit to serve on the jury.

Persons afflicted with any infirmity of body or mind, sufficient to incapacitate them from serving.

Persons who, by habit or religious vows, have relinquished all care of worldly affairs.

406. The following persons are exempt from the liability to serve

*Exemptions.* as jurors or as assessors,

namely :—

All officers in civil employ superior in rank to a Magistrate of the district

Judges and other Judicial officers.

Commissioners and Collectors of Revenue or Customs.

All persons engaged in the Preventive Service in the Customs Department.

All persons engaged in the collection of the revenue whom the Collector thinks fit to exempt on the ground of official duty.

Chaplains and others employed in religious offices.

All persons in the Military Service, except when, by any law in force for the time being, such persons are specially made liable to serve.

Surgeons and others who openly and constantly practise in the profession of physic.

Persons employed in the Post Office and Electric Telegraph Departments.

Persons actually officiating as priests in their respective religions.

All persons exempted by the local Government; and persons exempted by Government from personal appearance in Court under the provisions of the Code of Civil Procedure, section twenty-two.

The exemption from service given by this section is a right of which each person exempted may avail himself or not.

Nothing contained in this section shall be construed to disqualify any such person, if he is willing to serve as a juror or as an assessor.

The Sessions Judge may issue a summons to any exempted person to serve as an assessor or juror on the trial of a European British subject.

407. The Court of Session shall ordinarily, three days at the least before the time fixed for the holding of the Sessions, send a precept to a Magistrate directing him to summon as many persons, named in the said revised list, as seem to the Court to be needed for trials by jury and trials with the aid of assessors at the said Sessions, the number to be summoned not being less than double the number required for any case about to be tried at such Sessions.

The names of the persons to be summoned shall be drawn by lot in open Court, excluding those on the revised list who have served within six months, unless the number cannot be made up without them; the names so drawn shall be specified in the precept to the Magistrate

408. When a trial is to be held in which the accused person or one of the accused persons is entitled to be tried by a jury constituted under the provisions of section two hundred and thirty-four, the Court of Session shall, three days at least before the day fixed for holding such trial, cause to be summoned, in the manner herein after prescribed, as many European and American jurors as are required for the trial, if there be so many on the jury-list of the District, in which the trial is to be held.

The Court shall also at the same time in like manner cause to be summoned the same number of other persons named in the revised list, unless such number of such other persons shall have been already summoned for jury trials at that Session.

From the whole number of persons returned, the jurors, who are to constitute the jury, shall be taken by lot in the manner prescribed in section two hundred and forty until a jury containing the proper number of Europeans or Americans, or a number approaching thereto as nearly as possible has been obtained.

If a jury containing the requisite number of Europeans and Americans is not obtained, the accused person may elect to be tried by the Judge with the aid of assessors; otherwise he shall be tried by the jury obtained by the means aforesaid.



409. Every summons to a juror or assessor shall be in writing, and shall require his attendance as a juror or assessor at a time and place to be therein specified.

The summons or a copy thereof shall be served on every juror or assessor personally.

If the juror or assessor summoned be absent from his usual place of abode, the summons may be left for him there with some adult male member of his family residing with him.

410. The Court of Session may direct jurors or assessors to be summoned at other periods than the period specified in section four hundred and seven, when the number of trials before the Court renders the attendance of one set of jurors or assessors for a whole Session oppressive, or whenever it is found to be necessary.

411. If any person summoned to serve as a juror or assessor be in the service of the Government or of a Railway Company, the summons shall be sent to him through the head officer of the office in which he is employed; and the Court may excuse the attendance of such person if it appear, on the representation of such head-officer, that the person summoned cannot serve as a juror or assessor without inconvenience to the public service.

412. The Court of Session may excuse any juror or assessor from attendance for reasonable cause.

413. At each Session the Court shall cause to be made a list of the names of those who serve as jurors or assessors at such Session.

Such list shall be kept with the revised list of the jurors and assessors prepared under section four hundred and two.

A reference shall be made in the margin of the said revised list to each of the names which are mentioned in the list prepared under this section.

414. Any person summoned to attend as a juror or as an assessor who, without lawful excuse, fails to attend as required by the summons, or who, having attended, departs

without having obtained the permission of the Court, or fails to attend after an adjournment of the Court after being ordered to attend, shall be liable by order of the Court of Session to a fine not exceeding one hundred rupees.

Such fine shall be levied by the Magistrate of the District by attachment and sale of any movable property belonging to such juror or assessor within the jurisdiction of the Sessions Court making the order.

In default of recovery of the fine by such attachment and sale, such juror or assessor may be imprisoned in the civil jail for the space of fifteen days, if the fine be not sooner paid.

## CHAPTER XXX.

### MISCELLANEOUS PROVISIONS.

415. The seizure by any Police officer of property alleged or suspected to have been stolen, or found under circumstances which create suspicion of the commission of any offence, shall be forthwith reported to a Magistrate, who shall thereupon make such order respecting the custody and production of such property as he thinks proper.

If such property is of a perishable nature, or if it appears to the Magistrate that its sale would be for the benefit of the owner, such Magistrate may at any time direct it to be sold, and shall hold the proceeds of such sale in trust for the owner, subject to the provisions contained in sections four hundred and sixteen and four hundred and seventeen.

416. When the owner of any such property is unknown, the Magistrate may detain it, or the proceeds thereof, if sold, and, in case of such detention, shall issue a proclamation, specifying the articles of which such property consists or consisted, and requiring any person, who may have a claim thereto or to the proceeds thereof, to appear before him and establish his claim within six months from the date of such proclamation.

417. If no person within such period establishes his claim to such property or proceeds, and if the person, in whose possession



sion such property was found, is unable to show that it was legally acquired by him, such property shall be at the disposal of the Government, and may be sold under the orders of the Magistrate of the District, or a Magistrate of a Division of a District, or, if duly authorized, a Magistrate of the first class; or, if it has been already sold by the Magistrate, the proceeds thereof shall be at the disposal of the Government.

An appeal shall be allowed, to the Court to which appeals against sentences would lie, in the case of every order passed under this section.

418. When the trial in any Criminal Court is concluded, the Court may make such order as appears right for the disposal of any property, produced before it, regarding which any offence appears to have been committed.

419. Any Court of appeal, reference or revision may direct any such order passed by a Court subordinate thereto to be stayed, and may modify, alter or annul it.

420. The order, passed by any Court under section four hundred and eighteen or four hundred and nineteen, may be in the form of a reference of the property to the Magistrate of the District, or to a Magistrate of a division, of a district, who shall in such cases deal with it as if the property had been seized by the Police and the seizure had been reported to him in the manner hereinbefore mentioned.

421. Subject to any rules that may be passed by the Local Government, with the previous sanction of the Governor General of India in Council, the Criminal Courts may order payment on the part of Government of the reasonable expenses of any complainant or witness attending for the purpose of any trial before such Court under this Act.

422. When the services of an interpreter are required by any Criminal Court for the interpretation of any evidence or statement, he shall be bound to state the true interpretation of such evidence or statement.

## CHAPTER XXXI.

### LUNATICS.

423. When any person charged with an offence before a Magistrate, competent to try the case, appears to such Magistrate to be of unsound mind and incapable of making a defence, such Magistrate shall institute and inquiry to ascertain the fact of such unsoundness of mind, and shall cause the accused person to be examined by the Civil Surgeon of the District, or some other medical officer, and thereupon shall examine such Civil Surgeon or other medical officer, as a witness, and shall reduce the examination into writing.

If such Magistrate is of opinion that the accused person is of unsound mind, he shall stay further proceedings in the case.

424. When, from the evidence given before a Magistrate, there appears to be sufficient ground for believing that the accused person committed an act which, if he had been of sound mind, would have been an offence triable exclusively by the Court of Session, and that he was at the time when the act was committed, by reason of unsoundness of mind, incapable of knowing the nature of the act charged, or that he was doing what was wrong or contrary to law, such accused person shall, if he appears to be sane at the time of inquiry, be sent for trial by the Magistrate before the Court of Session.

If such accused person is a European British subject, the Magistrate shall follow the procedure prescribed in Chapter VII.

If an accused person appears to be insane at the time of inquiry, the Magistrate shall act in the manner provided in the last preceding section.

425. If any person, committed for trial before a Court of Session, shall at his trial appear to the Court to be of unsound mind and incapable of making his defence, the Court shall in the first instance try the fact of such unsoundness of mind, and if satisfied of the fact, shall give a special judgment that the accused person is of unsound mind and incapable of making his defence; and thereupon the trial shall be postponed.

426. Whenever an accused person is found

Release of lunatic pending investigation or trial.

to be of unsound mind and incapable of making his defence, the Magistrate or Court of Session, as the case may be, if the offence of which such person is accused be bailable, may release such person on sufficient security being given, that he shall be properly taken care of, and shall be prevented from doing injury to himself or to any other person, and for his appearance when required.

If the offence be not bailable, or if the required bail be not given, the

Custody of lunatic.

accused person shall be kept in safe custody in such place as the Local Government to which the case shall be reported shall direct.

427. Whenever an inquiry or trial is postponed under section four

Resumption of inquiry or trial.

hundred and twenty-three or section four hundred and twenty-five, the Magistrate or Court of Session, as the case may be, may, at any time, resume the inquiry or trial, and require the accused person, if detained in custody, to be brought before such Magistrate or Court; or, if the accused person has been released on security, may require his appearance.

The surety of such person shall be bound, at any time, to produce him to any officer whom the Magistrate or Court of Session appoints to inspect him; and the certificate of such officer shall have the same effect as the certificate of an Inspector General of Prisons or the Visitors of Lunatic Asylums, granted under section four hundred and thirty-two.

428. If, when the accused person appears

Procedure on accused appearing before Magistrate or Court of Session.

or is again brought before the Magistrate or the Court of Session,\* as the case may be it appears to such Magistrate or Court that the accused person is in a fit state of mind to make his defence, the inquiry shall proceed, or the accused person shall be put on his trial, as the case may require.

If it appears that the accused person is still of unsound mind, and incapable of making his defence, the Magistrate or Court of Session shall again act according to the provisions of section four hundred and twenty-three or section four hundred and twenty-five.

429. Whenever any person is acquitted

Finding in case of acquittal on ground of being lunatic.

upon the ground that, at the time at which he is charged with having committed an offence, he was, by reason of unsoundness of mind, incapable of knowing the nature of the act charged, or that he was doing what was wrong or contrary to law, the finding shall state specially whether such person committed the act or not.

430. Whenever such finding states that

Person so acquitted to be kept in safe custody.

the accused person committed the act charged, the Magistrate or Court of Session, before whom the trial was held, shall, if the act charged would, but for the incapacity found, have amounted to an offence, order such person to be kept in safe custody, in such place and manner as to the Magistrate or Court of Session seems fit, and shall report the case for the order of the Local Government.

The Local Government may order such person to be kept in safe custody in a Lunatic Asylum, or other suitable place of safe custody.

431. When any person is confined under

Lunatic prisoners to be visited by Inspector General.

the provisions of section four hundred and twenty-six or section four hundred and thirty, the Inspector General of Prisons, if such person is confined in a jail, or the Visitors of the Lunatic Asylums or any two of them, if he is confined in a Lunatic Asylum, may visit him in order to ascertain his state of mind; and he shall be visited, once at least in every six months by such Inspector General or by two of such visitors as aforesaid; and such inspector General or Visitors shall make a special report to the Local Government as to the state of mind of such person.

432. If such person is confined under section

Procedure where lunatic prisoner is reported capable of making his defence.

four hundred and twenty-six, and such Inspector General or Visitors as aforesaid shall certify that, in his or their opinion, such person is capable of making his defence, he shall be taken before the Magistrate or Court of Session, as the case may be, at such time as such Magistrate or Court of Session appoints; and such Magistrate or Court shall deal with such person under the provisions of section four hundred and twenty-eight; and the certificate

of such Inspector General or Visitors as aforesaid shall be receivable as evidence.

433. If such person is confined under the provisions of section four hundred and thirty, and such Inspector General or Visitors as aforesaid certify that in his or their judgment, he may be discharged without danger of his doing injury to himself or to any other person, the Local Government may thereupon either order him to be discharged; or to be detained in custody; or to be transferred to a public Lunatic Asylum, if he has not been already sent to such an Asylum; and may appoint a commission, consisting of a judicial officer not below the grade of a Sessions Judge, and to medical officers, whereof the chief medical officer attached to the Lunatic Asylum shall be one.

The said commission shall make formal inquiry into the state of mind of such person, taking such evidence as is necessary, and shall report to the Local Government who may order his discharge, or detention as to it may seem fit.

434. Whenever any relative or friend of any person detained under the provisions of section four hundred and thirty is desirous that he shall be delivered over to his care and custody, the Local Government, upon the application of such relative or friend and on his giving security to the satisfaction of such Government that the person detained shall be properly taken care of and shall be prevented from doing injury to himself or to any other person, may make an order that such person may be delivered to such relative or friend.

Whenever such person is so delivered over, it shall be upon condition that he shall be subject to the inspection of such officer as the Local Government appoints, and at such times as such Government directs.

The provisions of sections four hundred and thirty-one, and four hundred and thirty-three shall apply to persons detained under the provisions of this section; and the certificate of the inspecting officer appointed under this section shall be dealt with as a certificate of the Inspector General of Prisons, or the Visitors of Lunatic Asylums under the said sections.

## CHAPTER XXXII.

### CONTEMPTS OF COURT.

435. When any such offence as is described in sections one hundred and seventy-five, one hundred and seventy-eight, one hundred and seventy-nine, one hundred and eighty, or two hundred and twenty-eight of the Indian Penal Code is committed in the view or presence of any Civil, Criminal, or Revenue Court, the Court may cause the offender, whether he be a European British subject or not, to be detained in custody; and, at any time before the rising of the Court on the same day, may take cognizance of the offence; and adjudge the offender to punishment by fine not exceeding two hundred rupees, and in default of payment, by imprisonment in the civil jail for a period not exceeding one month, unless such fine be soon<sup>r</sup> paid.

In every such case the Court shall record the facts constituting the offence, with any statement the offender may make, as well as the finding and sentence.

If the offence is under section two hundred and twenty-eight of the Indian Penal Code, the record must show the nature and stage of the judicial proceeding in which such public servant was sitting, and the nature of the interruption or insult offered.

436. If the Court, in any case, considers that a person, accused of any such offence, should be imprisoned otherwise than in default of payment of fine, or that a fine exceeding two hundred rupees should be imposed upon him, such Court, after recording the facts constituting the offence, and the statement of the accused person as before provided, shall forward the case to a Magistrate, or, if the accused person be a European British subject, to a Magistrate of the first class who is a Justice of the Peace and a European British subject; and shall cause bail to be taken for the appearance of such accused person before such Magistrate, or, if sufficient bail be not tendered, shall cause such person to be forwarded under custody to such Magistrate.

If the case be forwarded to a Magistrate, he shall proceed to try the accused person in the manner provided by this Act for trials

before a Magistrate; and such Magistrate may adjudge the offender to punishment, as provided in the section of the Indian Penal Code under which he is charged.

If, in the case of a European British subject, the Magistrate to whom he is forwarded considers the offence to require a more severe punishment than he is competent to award under Chapter VII of this Act, he may commit the offender to the Sessions Court.

In no case tried under this section shall any Magistrate adjudge imprisonment or a fine exceeding two hundred rupees for any contempt committed in his own presence against his own Court.

437. When any Court has adjudged an offender to punishment, or forwarded him to a Magistrate for trial for refusing or omitting to do anything which he was lawfully required to do, or for any intentional insult or interruption, the Court may discharge the offender, or remit the punishment, on his submission to the order or requisition of such Court, or on apology being made to its satisfaction.

438. When any such offence as is described in Chapter X of the Indian Penal Code, (except sections one hundred and seventy-five, one hundred and seventy-eight, one hundred and seventy-nine, one hundred and eighty and two hundred and twenty-eight,) is committed in contempt of the lawful authority of any Civil, Criminal, or Revenue Court by a European British subject, such offence shall be cognizable only by a Magistrate of the 1st class who is a Justice of the Peace and a European British subject; and such Magistrate may deal with the offender on conviction in the same manner as is provided in that behalf in section seventy-four.

If such Magistrate considers the offence to require a more severe punishment than he is competent to award under the said section, he may commit the offender to the Sessions Court.

## PART X.

### CHARGE, JUDGMENT, AND SENTENCE.

#### CHAPTER XXXIII.

##### OF THE CHARGE.

##### FORM OF CHARGES.

439. The charge shall state the offence with which the accused person is charged.

If the law which creates the offence gives it any specific name, the offence may be described in the charge by that name only.

If the law which creates the offence does not give it any specific name, so much of the definition of the offence must be stated as to give the prisoner notice of the matter with which he is charged.

The Act and section or sections of the Act against which the offence is said to have been committed must be referred to in the charge.

The fact that the charge is made shall be equivalent to a statement that every legal condition, necessary by law to constitute the offence charged, was fulfilled in the particular case.

The charge may be written either in English or in the language of the district. If not written in a language understood by the prisoner, it must be read to him in a language which he understands.

If the accused person has been previously convicted of any offence, and if it is intended to prove such previous conviction for the purpose of affecting the punishment which is to be awarded, the fact of the previous conviction must be stated in the charge. If it is omitted, it may be added at any time before sentence is passed, but not afterwards.

##### Illustrations.

(a.) A is charged with the murder of B. This is equivalent to a statement that A's act fell within the definition of murder given in sections

299 and 300 of the Indian Penal Code; that it did not fall within any of the general exceptions of the Penal Code; and that it did not fall within any of the five exceptions to section 300, or that, if it did fall within exception 1, one or other of the three provisos to that exception applied to it.

(b.) A is charged under section 326 of the Indian Penal Code with voluntarily causing grievous hurt to B, by means of an instrument for shooting: this is equivalent to a statement that the case was not provided for by section 335 of the Indian Penal Code, and that the general exceptions did not apply to it.

(c.) A is accused of murder, cheating, theft, extortion, adultery or criminal intimidation, or using a false property-mark. The charge may state that A committed murder, or cheating, or theft, or extortion or adultery, or criminal intimidation, or that he used a false property-mark, without reference to the definitions of those crimes contained in the Indian Penal Code; but the sections under which the offence is punishable must, in each instance, be referred to on the charge.

(d.) A is charged under section 184 of the Indian Penal Code with intentionally obstructing a sale of property offered for sale by the lawful authority of a public servant. The charge should be in those words.

440. The charge shall contain such particulars as to the time and place of the alleged offence and the person against whom it was committed, as are reasonably sufficient to give notice to the accused person of the matter with which he is charged.

441. When the nature of the case is such that the particulars mentioned in sections four hundred and thirty-nine and four hundred and forty do not give sufficient notice to the accused person of the matter with which he is charged, the charge shall also contain such particulars of the manner in which the alleged offence was committed as will be sufficient for that purpose.

#### Illustrations.

(a.) A is accused of the theft of a certain article at a certain time and place. The charge need not set out the manner in which the theft was effected.

(b.) A is accused of cheating B at a given time and place. The charge must set out the manner in which A cheated B.

(c.) A is accused of giving false evidence at a given time and place. The charge must set out that portion of the evidence given by A which is alleged to be false.

(d.) A is accused of obstructing B, a public servant in discharge of his public function, at a given time and place. The charge must set out the manner in which A obstructed B in the discharge of his functions.

(e.) A is accused of the murder of B at a given time and place. The charge need not state the manner in which A murdered B.

(f.) A is accused of disobeying a direction of the law with intent to save B from punishment. The charge must set out the disobedience charged and the law infringed.

442. The charge may be in the form given in the third schedule to this Act or to the like effect.

443. No error either in the way in which the offence is stated or in the particulars required to be stated in section four hundred and forty-one, and no omission to state the offence, or to state those particulars, shall be regarded at any stage of the case as material, unless the person accused was in fact misled by such error or omission.

#### Illustrations.

(a.) A is charged under section 242 of the Indian Penal Code with "having been in possession of counterfeit coin, having known at the time when he became possessed thereof that such coin was counterfeit." The word "fraudulently" being omitted in the charge. Unless it appears that A was in fact misled by this omission, the error shall not be regarded as material.

(b.) A is charged with cheating B, and the manner in which he cheated B is not set out in the charge, or is set out incorrectly. A defends himself, calls witnesses, and gives his own account of the transaction. The Court may infer from this that the omission to set out the manner of the cheating is not material.

(c.) A is charged with cheating B, and the manner in which he cheated B is not set out in the charge. There were many transactions between A and B, and A had no means of knowing to which of them the charge referred, and offered no defence. The Court may infer from such facts that the omission to set out the manner of the cheating was in this case a material error.

(d.) A is charged with the murder of Khuda Baksh on the 21st January. In fact, the murdered person's name was Haidar Baksh and the date of the murder was the 20th January. A was never charged with any murder but one, and had heard the inquiry before the Magistrate which referred exclusively to the case of Haidar Baksh. The Court may infer from these facts that A was not misled, and that the error in the charge was immaterial.

(e.) A was charged with murdering Haidar Baksh on the 20th January and Khuda Baksh (who tried to arrest him for that murder) on the 21st January. When charged for the murder of Haidar Baksh he was tried for the murder of Khuda Baksh. The witnesses present in his defence were witnesses in the case of Haidar Baksh. The Court may infer from this that A was misled, and that the error was material.

444. Any accused person may apply to the Court by which he is tried for an amendment of the charge made against him; and in considering whether any error in a

charge did in fact mislead the accused person, the Court shall take into account the fact that he did or did not make such an application.

445. Any Court may, either upon the application of the accused person, or upon its own motion amend or alter any charge at any stage of the proceedings before judgment is signed, or, in cases of trials before a Court of Session, before the verdict of the jury is delivered or the opinion of the assessors is expressed. Such amendment shall be read and explained to the accused person.

446. If a prisoner is committed to the Court of Session, either without any charge at all, or upon a charge which the Court, upon reference to the proceedings before the committing Magistrate, considers improper, the Court of Session may draw up a charge of any offence, which it considers to be proved by the evidence taken before the committing Magistrate. A copy of such charge shall be given to the accused person.

447. If the amendment or alteration is such that proceeding immediately with the trial is not likely, in the opinion of the Court, to prejudice the accused person in his defence, it shall be at the discretion of the Court, after making such amendment or alteration, to proceed with the trial as if the amended charge had been the original charge.

448. If the amendment or alteration is such that proceeding immediately with the trial is likely, in the opinion of the Court, to prejudice the accused person in his defence, the Court may either direct a new trial, or suspend the trial for such period as may be necessary to enable the accused person to make his defence to the amended or altered charge; and, after hearing his defence, the Court may further adjourn the trial, to admit of the appearance of any witness, whose evidence the Court may consider to be material to the case, or whom the accused person may wish to be summoned in his defence.

449. In all cases of amendment or alteration of a charge, the prosecutor and accused person shall be allowed to recall and examined any witness who may have been examined.

450. If the offence stated in the new charge be one for which previous sanction is necessary, the case shall not be proceeded with until such sanction is obtained; unless sanction has been already obtained for a prosecution on the same facts as those on which the new charge was based.

451. If any Appellate Court, or the High Court in the exercise of its powers of revision, is of opinion that any person, convicted of an offence, was in fact misled in his defence by an error in the charge, it shall direct a new trial to be had upon a charge amended in whatever manner it thinks proper.

If such Court is of opinion that the facts of the case are such that no valid charge could be preferred against the person accused in respect of the facts proved, it shall quash the conviction.

#### Illustration.

A is convicted of an offence under section 188 of the Indian Penal Code upon a charge which omits to state that A knew that he was directed to abstain from a certain act by an order promulgated by a public servant lawfully empowered to promulgate such order. If the Court thinks it probable that A had such knowledge, and that he was misled in his defence by the omission from the charge of the statement that he had it, it shall direct a new trial upon an amended charge; but if it appears probable from the proceedings that A had no such knowledge, it shall quash the conviction.

#### JOINDER OF CHARGES.

452. There must be a separate charge for every distinct offence of which any person is accused, and every such charge must be tried separately except in the cases hereinafter excepted.

#### Illustration.

A is accused of a theft on one occasion, and of causing grievous hurt on another occasion. A must be separately charged and separately tried for the theft and the causing grievous hurt.

453. When a person is accused of more offences than one of the same kind committed within one year of each other, he may be charged and tried at the same time for any number of them not exceeding three.



*Explanation.*—Offences are said to be of the same kind under this section if they fall within the provisions of section four hundred and fifty-five.

454. I.—If in one set of facts so connected together as to form the same transaction, more offences than one are committed by the same person, he may be charged with and tried for every such offence at the same time.

II.—If a single act falls within two separate definitions of any law, in force for the time being, by which offences are defined or punished, the person who does it may be charged with each of the offences so committed, but he must not receive a more severe punishment than could be awarded, by the Court which tries him, for either

III.—If several facts of which one or more than one would by itself constitute an offence form, when combined, an offence under the provisions of any law, in force for the time being, by which offences are defined or punished, a person who does them may be charged with every offence which he may have committed, but he must not receive for such offences, collectively, a punishment more severe than that which might have been awarded, by the Court trying him, for any one of such offences, or for the offence formed by their combination.

#### Illustrations.

To paragraph I.

(a) A rescues B, a person in lawful custody, and causes grievous hurt to C, a constable in whose custody B was. A may be separately charged with, convicted of and punished for offences under sections 225 and 333, Indian Penal Code.

(b.) A has in his possession several counterfeit seals with the intention of committing several forgeries. A may be separately charged with, convicted of and punished for the possession of each seal for a distinct forgery, under section 473, Indian Penal Code.

(c.) A, with intent to cause injury to B, institutes proceedings against him knowing there is no just or lawful ground for such proceedings. A also falsely charges B with having committed an offence. A may be separately charged with, convicted of and punished for offences under section 211, Indian Penal Code.

(d.) A, with intent to injure B, brings a false charge against him of having committed an offence. On the trial, A gives false evidence against B. A may be separately charged with, convicted of and punished for offence under sections 211 and 194, or 195, Indian Penal Code.

(e) A, knowing that B, a female minor, has been kidnapped, wrongfully confines her and detains her as a slave. A may be separately charged with, convicted of and punished for offences under sections 368 (read with 367) and 370, Indian Penal Code.

(f.) A, with six others, commits the offences of rioting, grievous hurt and of assaulting a public servant engaged in suppressing the riot. A may be separately charged with, convicted of and punished for offences under sections 147, 325 and 152, Indian Penal Code.

(g) A criminally intimidates B, C and D at the same time. A may be separately charged with, convicted of and punished for each of the three offences under section 506, Indian Penal Code.

(h.) A intentionally causes the death of three persons by upsetting a boat. A may be separately charged with, convicted of and punished for three offences under section 302, Indian Penal Code.

To paragraph II.

(i) A commits mischief by cutting down a tree in a Government forest. The tree overhangs the bank of a river and falls into the stream. A commits theft by having severed the tree and by floating it down the river to his village, where he sells it. A may be separately charged with and convicted of offences under sections 426 and 379, Indian Penal Code; but the Court which tries him may not inflict a more severe sentence than it had convicted him under section 379 only.

(j.) A wrongfully strikes B with a cane. A may be separately charged with and convicted of offences under sections 352 and 323 of the Indian Penal Code; but the Court which tries him may not inflict a more severe sentence than it had convicted him under section 323 only.

(k.) A wrongfully kills a buffalo worth sixty rupees, belonging to B, and then takes away the carcass in a manner amounting to theft. A may be separately charged with and convicted of offences under sections 429 and 379, Indian Penal Code; but the Court which tries him may not inflict a more severe sentence than it had convicted him under section 429 only.

(l.) Several stolen sacks of corn are made over to A and B, who know they are stolen property. A and B thereupon assist each other to conceal the sacks at the bottom of a grain pit. A and B may be separately charged with and convicted of offences under sections 411 and 414, Indian Penal Code; but the Court which tries them may not inflict a severer sentence than if it had convicted them under one of those sections only.

(m.) A uses a forged document in evidence in order to convict B, a public servant, of an offence under section 167. A may be separately charged with and convicted of offences under sections 471 (read with 466) and 196 of the Indian Penal Code; but the Court which tries him may not inflict a severer sentence than if it had convicted him under one of those sections only.

To paragraph III.

(n.) A commits house-breaking by day with intent to commit adultery, and commits, in the house so entered, adultery with B's wife. A may be separately charged with and convicted of offences under sections 454 and 497, Indian Penal Code; but the Court which tries him may not inflict a severer sentence than if it had convicted him under section 497 only.



(c.) A robs B, and, in doing so, voluntarily causes hurt to him. A may be separately charged with and convicted of, offences under sections 323, 392 and 394 of the Indian Penal Code; but the Court which tries him may not inflict a severer sentence than if it had convicted him under section 392 or 394 only.

(p.) A entices B, the wife of C, away and then commits adultery with her. A may be separately charged with and convicted of offences under sections 498 and 497, Indian Penal Code; but the Court which tries him may not inflict a severer sentence than if it had convicted him under section 497 only.

455. If a single act or set of acts is of such a nature that it is doubtful which of several offences the facts which can be proved will constitute, the accused person may be charged with having committed any such offence; and any number of such charges may be tried at once, or he may be charged in the alternative with having committed some one of the said offences.

Where it is doubtful what offence has been committed.

#### Illustration.

A is accused of an act which may amount to either theft, receiving stolen property, criminal breach of trust or cheating. He may be charged separately with theft, criminal breach of trust, and cheating, or he may be charged with having committed either theft or criminal breach of trust or cheating.

456. If in the case mentioned in the last section, one charge only is brought against an accused person, and it appears in evidence that he committed a different offence, for which he might have been charged under the provisions of that section, he may be convicted of the offence which he is shown to have committed, although he was not charged with it.

When a person charged with one offence can be convicted of another.

#### Illustration.

A is charged with theft. It appears that he committed criminal breach of trust or receiving stolen goods. He may be convicted of criminal breach of trust or receiving stolen goods, though he was not charged with it.

457. When a person is charged with an offence, and part of the charge is not proved, but the part which is proved amounts to a different offence, he may be convicted of the offence, which he is proved to have committed, though he was not charged with it.

When offence proved included in offence charged.

#### Illustrations.

(a.) A is charged under section 407, Indian Penal Code, with criminal breach of trust in respect of property entrusted to him as a carrier. It appears that he did commit criminal breach of trust under

section 406 in respect of the property, but that it was not entrusted to him as a carrier. He may be convicted of criminal breach of trust under section 406.

(b.) A is charged with murder. He may be convicted of culpable homicide or of causing death by negligence.

458. When more persons than one are accused of the same offence, or of different offences, committed in the same transaction, or when one person is accused of committing any offence and another of abetment of or attempt to commit such offence, they may be charged and tried together or separately, as the Court thinks proper, and the provisions hereinbefore contained shall apply to all such charges.

What persons may be charged jointly.

#### Illustrations.

(a.) A and B are accused of the same murder. A and B may be charged and tried together for the murder.

(b.) A and B are accused of a robbery in the course of which A commits a murder with which B has nothing to do. A and B may be tried together on a charge, charging both of them with the robbery, and A alone with the murder.

(c.) A and B are both charged with a theft, and B is charged with two other thefts committed by him in the course of the same transaction. A and B may be both tried together on a charge, charging both with the one theft, and B alone with the two other thefts.

459. In trials before a Court of Session or High Court, when more charges than one are preferred against the same person, and when a conviction has been had on one or more of them, the Government Pleader or other officer conducting the prosecution may, with the consent of the Court, withdraw, or the Court of its own accord may suspend, the inquiry into the remaining charge or charges.

#### PREVIOUS ACQUITTALS OR CONVICTIONS.

460. A person who has once been tried for an offence and convicted or acquitted of such offence, shall, while such conviction or acquittal remains in force, not be liable to be tried again on the same facts for the same offence, nor for any other offence, for which a different charge from the one made against him might have been made under section four hundred and fifty-five, or for which he might have been convicted under section four hundred and fifty-six.

Person once convicted or acquitted not to be tried for same offence.

A person, convicted or acquitted of any offence, may be afterwards tried for any offence for which a separate charge might have been made against him on the former trial under section four hundred and fifty-four, paragraph 1.

A person acquitted or convicted of any offence in respect of any act causing consequences which, together with such act, constituted a different offence from that for which such person was acquitted or convicted, may be afterwards tried for such last-mentioned offence, if the consequences had not happened, or were not known to the Court to have happened, at the time when he was acquitted or convicted.

A person acquitted or convicted of any offence in respect of any facts may, notwithstanding such acquittal or conviction, be subsequently charged with and tried for any other offence which he may have committed in respect of the same facts, if the Court by which he was first tried was not competent to try the offence with which he is subsequently charged.

#### Illustrations.

(a.) A is tried upon a charge of theft as a servant and acquitted. He cannot afterwards be charged upon the same facts either with theft as a servant, with theft simply, or with criminal breach of trust.

(b.) A is tried upon a charge of murder and acquitted. There is no charge of robbery; but it appears from the facts that A committed robbery at the time when the murder was committed; he may afterwards be charged with and tried for robbery.

(c.) A is tried for an assault and convicted. The person afterwards dies. A may be tried again for culpable homicide.

(d.) A is tried under section 270 of the Indian Penal Code, for maliciously doing an act likely to spread the infection of a disease dangerous to life and is acquitted. The act so done afterwards causes a person permanently to lose his eyesight. A may be charged under section 325 with voluntarily causing grievous hurt to that person.

(e.) A is charged before the Court of Session and convicted of the culpable homicide of B. A may not afterwards be tried for the murder of B on the same facts.

(f.) A is charged by a Magistrate of the first class with, and convicted by him of, voluntarily causing hurt to B. A may not afterwards be tried for voluntarily causing grievous hurt to B on the same facts, unless the case comes within paragraph three.

(g.) A is charged by a Magistrate of the second class with, and convicted by him of, theft of property from the person of B. A may be subsequently charged with and tried for robbery on the same facts.

(h.) A, B and C are charged by a Magistrate of the first class with, and convicted by him of, robbing D. A, B and C may afterwards be charged with and tried for dacoity on the same facts.

## CHAPTER XXXIV.

### OF THE JUDGMENT, ORDER, AND SENTENCE.

461. When the trial in any Criminal Court is concluded, the Court, in passing judgment, if the accused person be convicted, shall distinctly specify the offence of which, and the section of the Indian Penal Code or other law under which, he is convicted;

or if it be doubtful under which of two sections, or under which of two parts of the same section such offence falls, the Court shall distinctly express the same, and pass judgment in the alternative, according to section seventy-two of the said Code.

462. In trials with assessors, when the exhibits have been perused, the witnesses examined, and the parties heard in person or by their respective pleaders, the Court shall pronounce its judgment. The judgment shall be pronounced in open Court either immediately or on some future day of which due notice shall be given to the parties or their pleaders.

463. The judgment or final order shall be written by the presiding officer of the Court in English or the language of the district.

If the language of the Judge be not English the judgment shall not be written in English unless the Judge be sufficiently conversant with the English language to be able to write a clear and intelligible decision in that language.

464. The judgment or final order shall contain the point of points for determination, the finding thereupon, and the reasons for the finding, and shall be dated and signed by the Judge in open Court at the time of pronouncing it. When a judgment or final order has been so signed, it cannot be altered or reviewed by the Court which gives such judgment or order. It shall specify the offence of which the accused person is convicted, and the punishment to which he is sentenced; or, if it be a finding of acquittal, it shall direct that he be set at liberty.

The judgment or order shall be explained to the accused person, or person affected by it; and a copy shall be given him in his own language as soon as possible.

The original shall be filled with the record of proceedings, and a translation thereof, where the original is recorded in a different language from that in ordinary use in the district, shall be incorporated in the record of the case.

In trials by Jury the Court need not state its reasons for its judgment, but shall record the heads of the charge to the Jury.

If the Judge differ from the Jury and determine to submit the case to the High Court, he shall record the grounds of his opinion.

Nothing herein contained shall prevent any Court from recalling any order other than a final order.

No error or defect in any judgment shall invalidate the proceedings.

## CHAPTER XXXV.

### PROSECUTIONS IN CERTAIN CASES.

465. A complaint of an offence punishable under Chapter VI of the Indian Penal Code, except section one hundred and twenty-seven, or punishable under section two hundred and ninety-four A of the said Code, shall not be entertained by any Court, unless the prosecution be instituted by order of, or under authority from, the Governor General of India in Council, or the Local Government or some officer empowered by the Governor General in Council to order or authorize such prosecution, or unless instituted by the Advocate General.

466. A complaint of an offence committed by a public servant in his capacity as such public servant, of which any Judge or any public servant not removable from his office without the sanction of the Government is accused as such Judge or public servant, shall not be entertained against such Judge or public servant, except with the sanction or under the direction of the Local Government, or of some officer empowered by the Local Government, or of some Court or other authority to which such Judge or public servant is subordinate, and whose

power so to sanction or direct such prosecution the Local Government shall not think fit to limit or reserve.

No such Judge or public servant shall be prosecuted for any act purporting to be done by him in the discharge of his duty unless with the sanction of Government.

The sanction must be given before the commencement of the proceedings.

The local Government may limit the person by whom, and the manner in which, the prosecution is to be conducted, and may specify the Court before which the trial is to be held.

467. A complaint of any offence described in Chapter X of the Indian Penal Code, not falling within section four hundred and thirty-five or four hundred and thirty-six of this Act shall not be entertained in any Criminal Court except with the sanction or on the complaint of the public servant concerned, or of his official superior.

The prohibition contained in this section shall not apply to the offences described in sections one hundred and eighty-nine and one hundred and ninety of the Indian Penal Code.

468. A complaint of an offence against public justice, described in section one hundred and ninety-three, one hundred and ninety-four, one hundred and ninety-five, one hundred and ninety-six, one hundred and ninety-nine, two hundred, two hundred and five, two hundred and six, two hundred and seven, two hundred and eight, two hundred and nine, two hundred and ten, two hundred and eleven, or two hundred and twenty-eight of the Indian Penal Code, when such offence is committed before or against a Civil or Criminal Court, shall not be entertained in the Criminal Courts, except with the sanction of the Court before or against which the offence was committed, or of some other Court to which such Court is subordinate.

469. A complaint of an offence relating to documents described in section four hundred and sixty-three, four hundred and seventy-one, four hundred and seventy-five, or four hundred and seventy-

six of the Indian Penal Code, when the document has been given in evidence in any proceedings in any Civil or Criminal Court, shall not be entertained against a party to such proceedings, except with the sanction of the Court in which the document was given in evidence, or of some other Court to which such Court is subordinate.

470. The sanction referred to in sections four hundred and sixty-seven, four hundred and sixty-eight, and four hundred and sixty-nine, may be expressed in general terms, and need not name the accused person.

Such sanction may be given at any time, and a sanction under any one of the three last preceding sections shall be deemed sufficient authority for the Court to amend the charge to one of an offence coming within either of the two remaining sections, if the facts disclose such offence.

*Explanation.*—In cases under this chapter, the report or application of the public servant or Court shall be deemed sufficient complaint.

471. When any Court, Civil or Criminal, is of opinion that there is sufficient ground for inquiring into any charge mentioned in sections four hundred and sixty-seven, four hundred and sixty-eight, and four hundred and sixty-nine, such Court, after making such preliminary inquiry as may be necessary, may either commit the case itself, or may send the case for inquiry to any Magistrate having power to try or commit for trial the accused person for the offence charged.

Such Magistrate shall thereupon proceed according to law; and the Court may send the accused person in custody or take sufficient bail for his appearance before such Magistrate, and may bind over any person to appear and give evidence on such trial or inquiry.

The Magistrate receiving the case may, if he is authorized to make transfers of cases, transfer the inquiry to some other competent Magistrate instead of completing the inquiry himself.

472. A Court of Session may charge a person for any such offence committed before it or under its own cognizance, if the offence be triable by the Court of Session exclusively, and may commit or hold to bail and try such person upon its own charge.

In such case the Court of Session shall have the same power of summoning, and causing the attendance at the trial of any witnesses for the prosecution or for the defence, as is vested in a Magistrate by this Act. Such Court may direct the Magistrate to cause the attendants of such witnesses on the trial.

473. Except as provided in sections four hundred and thirty-five, four hundred and thirty-six and four hundred and seventy-two, no Court shall try any person for an offence committed in contempt of its own authority.

474. In any case triable by the Court of Session exclusively, any Civil Court, before which such offence was committed, may, instead of sending the case for inquiry to a Magistrate, complete the inquiry itself, and commit or hold to bail the accused person to take his trial before the Court of Session.

For the purposes of an inquiry under this section, the Civil Court may exercise all the powers of a Magistrate; and its proceedings in such inquiry shall be deemed to have been held by a Magistrate.

If a Civil Court sends a case for inquiry and commitment to a Magistrate he is bound to receive and dispose of it; but if a Civil Court makes a commitment it shall complete the inquiry itself.

475. When any such commitment is made by order of a Civil Court, the Court shall frame a charge in the manner hereinbefore provided, and shall send the same with the order of commitment and the record of the case to the Magistrate of the District or other Magistrate of the first class; and such Magistrate shall bring the case before the Court of Session, together with the witnesses for the prosecution and defence.

476. Whenever any Court of Session or Civil Court commits or holds to bail any person for trial under sections four hundred and seventy-two, four hundred and seventy-four, or four hundred and seventy-five, it may also bind over any person to give evidence, and for that purpose may exercise all the powers of a Magistrate.

477. If any such offence, triable by the Court of Session exclusively, be committed before a Magistrate not empowered to commit for trial before a Court of Session, he shall send the case to a Magistrate competent to make such commitment, who shall proceed to put such order in the case as he thinks fit.

478. A complaint of an offence under section four hundred and ninety-seven of the Indian Penal Code shall not be instituted except by the husband of the woman or by any person under whose care she was living at the time when the adultery was committed.

479. A complaint of an offence under section four hundred and ninety-eight of the Indian Penal Code shall not be instituted, except by the husband of the woman or by the person having care of such woman on behalf of her husband.

## PART XI.

### PREVENTIVE JURISDICTION OF MAGISTRATES.

#### CHAPTER XXXVI.

##### OF THE DISPERSION OF UNLAWFUL ASSEMBLIES.

480. Any Magistrate or officer in charge of a Police-station may command any unlawful assembly or any assembly of five or more persons, likely to cause a disturbance of the public peace, to disperse; and it shall thereupon be the duty of the members of such assembly to disperse accordingly.

481. If, upon being so commanded, any such assembly does not disperse, or if, without being so commanded, it conducts itself in such a manner as to show a determination not to disperse, any Magistrate or officer in charge of a Police-station may proceed to disperse such assembly by force, and may require the assistance of any person, other than any European or Native Troops of Her Majesty acting as such, for the purpose of dispersing it, and arresting the persons who form part of it.

482. If an unlawful assembly cannot be otherwise dispersed, and if it is necessary for the public security that it should be dispersed, the Magistrate of the highest rank, who is present, may cause it to be dispersed by Military Force.

483. No Magistrate shall be held to commit any offence by ordering the dispersion by Military Force of any assembly, the dispersion of which he regards, on reasonable grounds and in good faith, as necessary to the public security.

484. When a Magistrate determines to disperse an assembly by Military Force, he may require any officer in command of any of Her Majesty's Troops, whether European or Native, to disperse such assembly by such force; and it shall be the duty of every such officer to obey every such requisition in such manner as in his discretion appears proper; but in doing so he shall use as little force and do as little injury to person and property as is consistent with dispersing the assembly and arresting and detaining such persons as he may be directed by the Magistrate to arrest and detain, or as it may be necessary to arrest and detain for the purpose of dispersing the assembly.

485. No officer, obeying any such requisition, shall be held to have committed any offence by any act done by him in good faith in order to comply with it.

486. No inferior officer or private soldier shall be held to have committed any offence by any act done for the dispersion of any such assembly.

bly in obedience to any order, which he was bound by the Mutiny Act or by the Indian Articles of War to obey.

487. When the public security is manifestly endangered by an unlawful assembly, and when no Magistrate can be communicated with, any Commissioned Officer of Her Majesty's European or Native Forces may disperse any such assembly by military force; and in doing so, he shall have the same protection as a Magistrate, and all officers and soldiers acting under his orders shall have the protection mentioned in section four hundred and eighty-six; but as soon as such Commissioned Officer can communicate with any Magistrate, it is his duty to do so.

488. No prosecution against any Magistrate, officer or soldier for any act done under the provisions contained in sections four hundred and eighty-one, four hundred and eighty-two, four hundred and eighty-four and four hundred and eighty-seven shall be instituted in any Criminal Court except with the sanction of the Government of India, or the Government of Madras or Bombay.

*Sanction required to prosecutions for acts done under sections 481, 482, 484 and 487.*

## CHAPTER XXXVII.

### OF SECURITY FOR KEEPING THE PEACE.

489. Whenever a person, accused of rioting, assault, or other breach of the peace, or with abetting the same, or with assembling armed men or taking other unlawful measures with the evident intention of committing the same, is convicted of such offence before a Court of Session, or Magistrate of a division of a District, or Magistrate of the first class,

and the Court or Magistrate, by which or by whom such person is convicted, or the Court or Magistrate, by which or by whom the final sentence or order in the case is passed, is of opinion that it is just and necessary to require such person to give a personal recognizance for keeping the peace;

such Court or Magistrate may, in addition to any other order passed in the case, direct that the person so convicted be required to execute a formal engagement, in a sum

proportionate to his condition in life and the circumstances of the case, for keeping the peace during such period as it may appear proper to fix in each instance, not exceeding one year if the sentence or order be passed by a Magistrate, or three years if the sentence or final order be passed by a Court of Session, with a provision that if the same be not given the person required to enter into the engagement shall be kept in simple imprisonment for any time not exceeding one year, if the order be passed by a Magistrate, or three years if the order be passed by the High Court or by a Court of Session unless, within such period such person execute such formal engagement as aforesaid.

If the accused person be sentenced to imprisonment, the period, for which he may be required to execute a recognizance, and the imprisonment in default of executing such recognizance shall commence when he is released on the expiration of his sentence.

When any accused person is convicted of any offence specified in this section by a Magistrate neither in charge of a division of a District nor of the 1st class, such Magistrate, if he

*Where convicting officer is not in charge of division of district nor a Magistrate of 1st class.*

considers it just and necessary to require a personal recognizance for keeping the peace from the person so convicted, shall report the case to the Magistrate of the District, the Magistrate of the division of the District or to a Magistrate of the first class to whom such Magistrate is subordinate; and the Magistrate to whom the case is so reported, shall deal with the case as if the conviction had been before himself.

In any case where the order is not made at the time of signing, or by the Court which signs the judgment, the convict must be produced before the Magistrate who adds the order to enter into a personal recognizance to the original sentence.

490. Whenever it appears necessary to require security for keeping the peace, in addition to the personal recognizance of the

party so convicted, the Court or Magistrate, empowered to require a personal recognizance, may require security in addition thereto, and may fix the amount of the security-bond to be executed by the surety or sureties; with a provision that, if the same be not given, the party required to find the security shall be kept in simple

*Personal recognizance to keep the peace in cases of conviction.*

*Security to keep the peace.*



imprisonment for any time not exceeding one year if the order be passed by the Magistrate of the District, Magistrate of a Division of a District, or by a 1st class Magistrate, or three years if the order be passed by the High Court or by a Court of Session.

491. Whenever a Magistrate of a division of a District, or a Magistrate of the 1st class, receives information that any person is likely to commit a breach of the peace, or to do any act that may probably occasion a breach of the peace, he may summon such person to attend at a time and place mentioned in the summons, to show cause why he should not be required to enter into a bond to keep the peace, with or without sureties, as such Magistrate thinks fit.

*Explanation I.*—A summons, calling on a person to show cause why he should not be bound over to keep the peace, may be issued on any report or other information which appears credible and which the Magistrate believes; but the Magistrate cannot bind over a person until he has adjudicated on evidence before him.

*Explanation II.*—A Magistrate may recall a summons issued under this section if he thinks proper.

492. Such summons shall set forth the substance of the report or information on which it is issued, the amount of the bond, and the term for which it is to be in force, and, if security is called for the number of sureties, required, and the amount in which they are to be bound respectively; and the time and place at which the person summoned is required to attend.

*Explanation.*—When the parties are present in Court no summons is necessary, but the person to whom a summons would have been issued must have an opportunity to show cause why he should not be bound.

493. The bond shall be in the Form (E) given in the second schedule or to the like effect; and its penalty shall be fixed with a due regard to the circumstances of the case and the means of the party.

The amount in which the sureties shall be bound shall not exceed the penalty named in the bond.

494. If the person summoned does not attend at the time and place named in the summons on the day appointed, such Magistrate, if satisfied that the summons has been duly served, may issue a warrant for his arrest:

Provided that, whenever it appears to such Magistrate, upon the report of a Police officer or upon other credible information (the substance of which report or information shall be recorded), that there is just reason to fear the commission of a breach of the peace, which may probably be prevented by the immediate arrest of any person, the Magistrate may at any time issue a warrant for his arrest.

495. The Magistrate may, if he sees sufficient cause, dispense with the personal attendance of the person informed against, under section four hundred and ninety-one, and may permit him to appear and enter into the required security, or show cause against such requisition by an agent duly authorized to act in his behalf.

496. If on the appearance of such person informed against, or of his agent, if he is permitted to appear by agent, the Magistrate is not satisfied that there is occasion to bind such person to keep the peace, the Magistrate shall direct his discharge.

497. If the Magistrate is satisfied that it is necessary for the preservation of the peace to take a bond from such person with or without security, he shall make an order accordingly; and if such person fails to comply with the order, the Magistrate may order him to be kept in simple imprisonment until he furnish the same.

498. The period for which the Magistrate may bind a person to keep the peace with or without security, shall not exceed one year.

When a person is imprisoned under section four hundred and ninety-seven, he shall not be detained by authority of the Magistrate beyond the term of one year.



and shall be released whenever, within that term, he complies with the order.

499. Whenever it appears to the Magistrate that it is necessary, for <sup>Extension of time for which person may be bound.</sup> the preservation of the peace to bind a person beyond the term of one year, he may, before the expiration of the first year, record his opinion to that effect and the grounds thereof, and may refer the case for the orders of the Court of Session.

Such Court, after examining the proceedings of the Magistrate, and making such further inquiry as it thinks necessary, may, if it see cause, authorize the Magistrate to extend the term for a further period not exceeding one year.

If such person fails to give a bond, with security if required, for his keeping the peace for such further period as the Magistrate under the orders of the Court of Session directs, he may be kept in simple imprisonment for such further period, or until, within that period, he gives such bond.

*Explanation.*—When the subject of dispute, or ground for apprehension, is the same as that on which the first order was passed, the Magistrate must proceed under this section if the first bond is still in force, and not under section four hundred and ninety-one.

500. The Magistrate of the District may, <sup>Discharge of recognizances.</sup> if he see sufficient cause, discharge any recognizance and surety for keeping the peace taken by him, or by any Magistrate subordinate to him, or by his predecessor under the preceding sections, and may order the release of the person confined for default in entering into such recognizance or giving such security.

501. A surety for the peaceable conduct of another person may at any time apply to the Magistrate to be relieved from his engagement as surety. <sup>Discharge of sureties.</sup>

On such application being made, the Magistrate shall issue his summons or warrant in order that the person, for whom such surety is bound, may appear or be brought before him.

On the appearance of the person to such warrant or on his voluntary surrender, the Magistrate shall direct the engagement of the surety to be cancelled, and shall call

upon such person to give fresh security, and in default thereof shall order him to be kept in simple imprisonment.

502. Whenever it is proved before the Magistrate that any recognizance or other bond taken under this chapter has been forfeited, he shall record the grounds of such proof, and shall call upon the person, bound by such recognizance or bond, to pay the penalty thereof, or to show cause why it should not be paid. <sup>Recovery of penalty from principal.</sup>

If sufficient cause be not shown and the penalty be not paid, the Magistrate shall proceed to recover the same by issuing a warrant for the attachment and sale of any of the movable property belonging to the person bound by such recognizance or bond.

Such warrant may be executed within the jurisdiction of the Magistrate of the District in which it is issued; and it shall authorize the distress and sale of any movable property belonging to the person bound without the jurisdiction of the said Magistrate, when endorsed by the Magistrate of the District in which such property is situated.

If such penalty be not paid and cannot be recovered by such attachment and sale, such person shall be liable to imprisonment by order of the Magistrate in the civil jail for a period not exceeding six months.

The penalty shall not be enforced until the person bound has had an opportunity of showing cause and until the breach of the conditions has been proved.

The commission, or attempt to commit or abetment of any offence whatever and wherever it may be committed, is a breach of the bond.

Proceedings under this Chapter may be taken either in the district in which the breach of the peace is apprehended, or where an offence has been committed in breach of the bond, or in any district where the person it is desired to bind may be.

503. Whenever it is proved before the Magistrate that any bond with a surety <sup>Recovery of penalty from surety.</sup> has been forfeited, the Magistrate may at his discretion give notice to the surety to pay the penalty, to which he has thereby become liable, or to show cause why it should not be paid.

If no sufficient cause is shown, and such penalty is not paid, the Magistrate may

proceed to recover payment of the penalty from such surety in the same manner as from the principal party.

## CHAPTER XXXVIII.

### OF SECURITY FOR GOOD BEHAVIOUR.

504. Whenever it appears to the Magistrate of the District, or to a Magistrate of the 1st class, that any person is lurking within his jurisdiction, or that there is within his jurisdiction a person who has no ostensible means of subsistence, or who cannot give a satisfactory account of himself, such Magistrate may require such security for such person's good behaviour for a period not exceeding six months as to him may appear good and sufficient.

If in any case under this or the two following sections the person to be bound is under sentence for an offence, he must be brought up on or after the expiration of his sentence for the purpose of being bound.

If a Sessions Judge, or Magistrate of the second or third class, considers, from evidence taken in any proceedings before him, that any person should be required to enter into a bond to be of good behaviour, he may send such person in custody to a competent Magistrate.

A Magistrate in charge of a Division of a District, exercising the powers of a Magistrate of the second class, may make any inquiry necessary under this chapter, and may submit his proceedings to the Magistrate of the District who may pass such order on them, either directing the person whose character was inquired into to furnish security or not, as he thinks fit.

505. Whenever it appears to such Magistrate from the evidence as to general character, adduced before him, that any person is by repute a robber, house-breaker, or thief, or a receiver of stolen property, knowing the same to have been stolen, or of notoriously bad livelihood, or is a dangerous character,

such Magistrate may require similar security for the good behaviour of such person for a period not exceeding one year.

506. Whenever it appears to such Magistrate from the evidence as to general character adduced before him, that any person is by habit a robber, house-breaker, or thief, or a receiver of stolen property, knowing the same to have been stolen, or of a character so desperate and dangerous as to render his release, without security, at the expiration of the limited period of one year, hazardous to the community,

he shall record his opinion to that effect, with an order specifying the amount of security which should, in his judgment, be required from such person, as well as the number, character, and class of sureties, and the period, not exceeding three years, for which the sureties should be responsible for such person's good behaviour, and if such person does not comply with the order, the Magistrate shall issue a warrant directing his detention pending the orders of the Court of Session.

507. If a person required to furnish security, under the provisions of the last preceding section, does not furnish the same, or offers sureties whom the Magistrate sees fit to reject, the proceedings shall be laid, as soon as conveniently may be, before the Court of Session.

Such Court, after examining such proceedings and requiring any further information or evidence which it thinks necessary, may pass orders on the case, either confirming, modifying or annulling the orders of such Magistrate as it thinks proper.

508. If the Court of Session does not think it safe to direct the immediate discharge of such person, it shall fix a period for his detention, not exceeding three years, in the event of his not giving the security required from him.

509. Whenever security for good behaviour is required by the Court of Session or by a Magistrate, the amount, the security, the number and description of securities, and the period of time for which the securities are to be responsible for the

When Magistrate may require security for good behaviour for six months.

Binding of sentenced person.

When Sessions Judge or unauthorized Magistrate thinks a person should be bound.

Powers of Magistrate of Division of District being a Magistrate of the 2nd class to inquire.

When Magistrate may require security for good behaviour for one year.

Procedure where security required for more than one year.

Proceedings to be laid before Court of Session.

Court of Session may require security for period not exceeding three years.

Contents of order for security.

good conduct of the person required to furnish security, shall be stated in the order.

The security-bond shall be in the Form (G) given in the second schedule, or to the like effect.

510. In the event of any person, required to give security under the provisions of this chapter, failing to furnish the security so required, he shall be committed to prison until he furnish the same:

Provided that no such person shall be kept in prison for a longer period than that for which the security has been required from him.

Imprisonment under this section may be rigorous or simple, as the Court or Magistrate in each case directs.

511. The Magistrate of the District may, at any time, exercise his discretion in releasing, without reference to any other authority, any prisoner confined under requisition of security for good behaviour, whether by his own order, or that of his predecessor in office, or by the order of any officer subordinate to him, provided he is of opinion that such person can be released without hazard to the community.

*Release of prisoners under requisition of security.*

512. Whenever the Magistrate of the District is of opinion, that any person confined under requisition of security for good behaviour by order of a Court of Session, can be safely released without such security, such Magistrate shall make an immediate report of the case for the orders of such Court of Session.

*Report in case of prisoner under requisition of security by order of Court of Session.*

513. A surety for the good behaviour of a person may at any time apply to a competent Magistrate to be relieved from his engagement as such surety.

On such application being made, such Magistrate shall issue his summons or warrant in order that such person may appear or be brought before him.

On the appearance of such person pursuant to such summons or warrant, or on his voluntary surrender, such Magistrate shall direct the engagement of the surety to be cancelled, and shall call upon the person so appearing or surrendering to give fresh

security, and, in default thereof, shall commit him to custody.

514. Whenever a competent Magistrate is of opinion that, by reason of an offence, proved to have been committed by a person, for whose good behaviour security has been given, subsequent to his having given such security, proceedings should be had upon the bond executed by the surety, such Magistrate shall give notice to the surety to pay the penalty, or to show cause why it should not be paid.

If such penalty be not paid and no sufficient cause for non-payment be shown, such Magistrate shall proceed to recover the penalty from such surety by issuing a warrant for the attachment and sale of any movable property belonging to him. Such warrant may be executed within the jurisdiction of the Magistrate of the District in which it is issued; and it shall authorize the distress and sale of any movable property, belonging to such surety, without the jurisdiction of the said Magistrate, when endorsed by the Magistrate of the District in which such property is situated.

If such penalty be not paid, and cannot be recovered by such attachment and sale, the surety shall be liable to imprisonment by order of such Magistrate in the civil jail for a period not exceeding six months.

515. The provisions of sections four hundred and ninety-two and four hundred and ninety-four, relating to the issue of summons and warrant of arrest for securing the personal attendance of the party informed against, when such party is not in custody, shall apply to proceedings taken under this chapter against persons required to give security for their good behaviour.

*Issue of summons and warrant of arrest.*

Proceedings may be taken under this chapter, against persons amenable to its provisions, in any district where they may be.

*Place where proceedings may be held.*

Any evidence, taken under Chapter XXXVII or this chapter, shall be taken as in cases usually heard by a Magistrate upon summons.

*Manner of taking evidence under Chapter XXXVII or this chapter.*

Any previous conviction against the person to be bound may be proved on proceedings held under this chapter.

*Previous convictions may be proved.*

516. A Magistrate may refuse to accept any surety offered under this chapter on the ground that such surety is an unfit person.

Sureties may be rejected on the ground of character.  
Chapter not applicable to European British subjects.  
 517. The provisions of this chapter shall not apply to European British subjects.

## CHAPTER XXXIX.

### LOCAL NUISANCES.

518. A Magistrate of the District, or a Magistrate of a division of a District, or any Magistrate specially empowered, may, by a written order, direct any person to abstain from a certain act, or to take certain order with certain property in his possession, or under his management, whenever such Magistrate considers that such direction is likely to prevent, or tends to prevent, obstruction, annoyance or injury, or risk of obstruction, annoyance or injury, to any persons lawfully employed, or danger to human life, health, or safety, or a riot or an affray.

*Explanation I.*—This section is intended to provide for cases where a speedy remedy is desirable and where the delay, which would be occasioned by a resort to the procedure contained in section five hundred and twenty-one and the next following sections, would, in the opinion of the Magistrate, occasion a greater evil than that suffered by the person upon whom the order was made, or would defeat the intention of this chapter.

*Explanation II.*—An order may, in cases of emergency or in cases where the circumstances do not admit of the serving of notice, be passed *ex parte*, and may in all cases be made upon such information as satisfies the Magistrate.

*Explanation III.*—An order may be directed to a particular individual, or to the public generally when frequenting or visiting a particular place.

*Explanation IV.*—Any Magistrate may recall or alter any order made under this section by himself or by his predecessor in the same office.

519. A Magistrate of the District, or a Magistrate of a division of a District, or any Magistrate, specially empowered, may enjoin any person not to repeat or continue a public nuisance, as defined in section two hundred and sixty-eight of the Indian Penal Code or under any Local or Special Law.

520. Orders made under sections five hundred and eighteen and five hundred and nineteen are not judicial proceedings.

521. Whenever a Magistrate of the District or a Magistrate of a division of a District, or, when empowered by the Local Government in this behalf, a Magistrate of the first class, considers that any unlawful obstruction or nuisance should be removed from any thoroughfare or public place, or that any trade or occupation, by reason of its being injurious to the health or comfort of the community, should be suppressed or should be removed to a different place, or that the construction of any building, or the disposal of any combustible substance, as likely to occasion conflagration, should be prevented,

or that any building is in such a state of weakness that it is likely to fall, and thereby cause injury to persons passing by, and that its removal in consequence is necessary, or that any tank or well adjacent to any public thoroughfare should be fenced in such a manner as to prevent danger arising to the public—

such Magistrate may issue an order to the person causing such obstruction or nuisance, or carrying on such trade or occupation, or being the owner or in possession of, or having control over, such building, substance, tank, or well as aforesaid, calling on him, within a time to be fixed in the order,

to remove such obstruction or nuisance, or to suppress or remove such trade or occupation, or to stop the construction of such building,

or to remove it, or to alter the disposal of such substance, or to fence such tank or well, as the case may be, or to appear before himself or some other Magistrate of the 1st or 2nd class within

the time mentioned in the order, and show cause why such order should not be enforced.

The issue of an order under this section shall be a judicial proceeding whether or not evidence is taken therein.

*Order to be a Judicial proceeding.*

Such order may be issued on a report or other information which the Magistrate believes, and shall direct the person to whom it is addressed either to obey it or to show cause why it should not be obeyed. The order shall not be made absolute, except as is hereinafter provided, until opportunity has been given to the person affected to show cause.

*Explanation*—A "public place" includes property belonging to the State, camping grounds, and grounds left unoccupied for sanitary and recreative purposes.

522. The order mentioned in section five hundred and twenty-one shall, if practicable, be served personally on the person to whom it is issued.

But if personal service is found to be impracticable, such order shall be notified by proclamation, and a written notice thereof shall be stuck up at such place or places as may be best adapted for conveying the information to such person.

523. The person, to whom such order is issued, shall be bound, within the time specified in the order, to obey the same; or to appear before the Magistrate, before whom he was required by the order to appear and show cause as aforesaid; or he may apply to such Magistrate for an order for a jury to be appointed to try whether such order is reasonable and proper.

On receiving such application, such Magistrate shall forthwith appoint a jury consisting of an uneven number of persons not less than five, of whom the foreman and one-half of the remaining members shall be nominated by such Magistrate, and the other members by the applicant.

The execution of the order shall be suspended pending such inquiry, and the Magistrate who issued the order or before whom the applicant appears shall be guided by the decision of the jury, which shall be according to the opinion of the majority.

*Suspension of order.*

If the applicant by neglect or otherwise prevents, or if he does not claim the appointment of a jury, or if from any cause the jury so appointed do not decide and report within a reasonable time, the Magistrate may pass such order as he thinks proper, which order shall be carried out in the manner hereinafter provided.

The time within which the report is to be made shall be fixed by the Magistrate in the order for the appointment of the jury, and may from time to time be extended by him. When the jury have made their report, the order of the Magistrate must be founded thereon, except in cases falling under section five hundred and twenty-eight.

524. Such Magistrate may summon so many jurors as may be necessary, and such persons shall be bound to attend and make their inquiry and report.

Any juror failing to attend or neglecting his duty as a juror shall be liable to be dealt with under section one hundred and seventy-four of the Indian Penal Code.

525. If the person, to whom the order, mentioned in section five hundred and twenty-one, is issued, appears to show cause against the same, as hereinafter provided, the Magistrate shall take evidence in the matter, but if he does not appear or does not obey the order,

or apply for a jury within the time specified in such order,

he shall be liable to the penalty prescribed in that behalf in section one hundred and eighty-eight of the Indian Penal Code;

and the Magistrate, who issued such order, may proceed to carry it into execution at the expense of such person, and may realize such expenses, either by the sale of any building, goods, or other property removed by his order, or by the distress and sale of such movable property of such person within or without his jurisdiction. If such property is without his jurisdiction, the order shall authorize its attachment and sale when endorsed by the Magistrate in whose jurisdiction the goods are attached.

No suit shall lie in respect of anything necessarily or reasonably done in carrying out the provisions of this section.

*When order may be made absolute.*

*Report of jury and order thereon.*

*Attendance of jury.*

*Procedure in case of disobedience or neglect by person ordered.*

*Person ordered shall obey or may claim a jury.*

*Constitution of jury.*

526. If, in a case referred to a jury, the jury find that the order of the Magistrate is reasonable and proper, as originally made, or subject to a modification which the Magistrate accepts, the Magistrate, who issued the order, or before whom cause was shown, shall give notice of such finding to the person to whom the order was issued, and shall add to such notice an order to obey the aforesaid order, within a time to be fixed in the notice, and an intimation that, in case of disobedience, such person will be liable to the penalty provided by section one hundred and eighty-eight of the Indian Penal Code.

If such latter order is not obeyed, the Magistrate may proceed as in section five hundred and twenty-five.

527. If the person, to whom the order of the Magistrate, under section four hundred and twenty-one, is issued, appears and shows cause against it so as to satisfy the Magistrate who issued it that it is not reasonable and proper, no further proceedings shall be taken in the case.

528. If the Magistrate who issued the order considers that immediate measures are necessary to be taken to prevent imminent danger or injury of a serious kind to the public, he may issue such an injunction to the person, to whom the order under section five hundred and twenty-one was issued, as is required to obviate or prevent such danger or injury, whether a jury is to be, or has been appointed or not.

In default of such person forthwith taking all necessary measures ordered to be taken by such injunction, the Magistrate may himself use or cause to be used such means as may be necessary to obviate such danger or to prevent such injury.

No suit shall lie in respect of anything necessarily or reasonably done for that purpose.

529. Nothing in this chapter shall interfere with the provisions of section forty-eight of Act No. XXIV of 1859 (for the better regulation of the Police within the territories subject to the Presidency of Fort St. George), or of section thirty-four of Act No. V of

1861 (for the regulation of Police), or of section sixteen of Act No. VIII of 1867 (for the regulation of the District Police in the Presidency of Bombay), of the Governor of Bombay in Council.

## CHAPTER XL.

### POSSESSION.

530. Whenever the Magistrate of the District, or a Magistrate of a division of a District or Magistrate of the first class, is satisfied that a dispute, likely to induce a breach of the peace, exists concerning any land or the boundaries of any land, or concerning any houses, water, fisheries, crops or other produce of land, within the limits of his jurisdiction.

Such Magistrate shall record a proceeding stating the grounds of his being so satisfied, and shall call on all parties concerned in such dispute to attend his Court in person, or by agent, within a time to be fixed by such Magistrate, and to give in a written statement of their respective claims, as respects the fact of actual possession of the subject of dispute.

Such Magistrate shall, without reference to the merits of the claims of any party to a right of possession, proceed to inquire and decide which party is in possession of the subject of dispute.

After satisfying himself upon that point, he shall issue an order declaring the party or parties to be entitled to retain possession until ousted by due course of law, and forbidding all disturbance of possession until such time.

*Explanation.*—Such Magistrate may satisfy himself of the existence of a dispute likely to induce a breach of the peace from a report or other information; but the question of possession must be decided on evidence taken before him.

531. If such Magistrate decides that neither of the parties is in possession, or is unable to satisfy himself as to which person is in possession of the subject of dispute, he may attach it, until a competent Civil Court shall

Procedure where jury finds Magistrate's order to be reasonable.

Procedure where person ordered satisfies Magistrate that order is not reasonable.

Injunction pending inquiry by jury.

Saving of certain statutory provisions.

Magistrate how to proceed if any dispute concerning land, &c., is likely to cause breach of the peace.

Party in possession to be continued until ousted by due course of law.

If previous possession cannot be ascertained, Magistrate may attach subject of dispute.



have determined the rights of the parties, or who ought to be in possession.

532. If a dispute arise concerning the right of use of any land or water, or any right of way, such Magistrate, within whose jurisdiction the subject of dispute lies, may inquire into the matter; and if it appears to him that the subject of dispute is open to the use of the public, or of any person or of any class of persons, such Magistrate may order that possession thereof shall not be taken or retained by any one to the exclusion of the public, or of such person, or of such class of persons, as the case may be, until the person claiming such possession shall obtain the decision of a competent Civil Court, adjudging him to be entitled to such exclusive possession:

Provided that such Magistrate shall not pass any such order, if the matter be such that the right of use is capable of being exercised at all times of the year, unless such right has been ordinarily exercised within three months from the date of the institution of the inquiry; or, in cases where the right of use exists at particular seasons, unless such right has been exercised during the last of such seasons before the complaint.

533. Whenever a local inquiry is necessary for the purposes of this chapter, any Magistrate of the first class may depute any Magistrate subordinate to him to make the inquiry, and may furnish him with such instructions, consistent with the law for the time being in force, as may seem necessary for his guidance, and may declare by whom the whole or any part of the necessary expenses of the inquiry shall be paid.

534. Whenever, in any criminal Court, a person is convicted of an offence attended with criminal force, and it appears to such Court that by such criminal force any person has been dispossessed of any immovable property, the Court may order such person to be restored to possession.

No such order shall prejudice any right over such immovable property which any person may be able to show in a civil suit.

535. Nothing in this chapter shall affect the powers of a Collector, or a person exercising the powers of a Collector or of a Revenue Court.

## CHAPTER XLI.

### OF THE MAINTENANCE OF WIVES AND FAMILIES.

536. If any person, having sufficient means, neglects or refuses to maintain his wife, or legitimate or illegitimate child unable to maintain himself, the Magistrate of the District, or a Magistrate of a Division of a District or a Magistrate of the first class may, upon due proof thereof by evidence, order such person to make a monthly allowance for the maintenance of his wife or such child at such monthly rate, not exceeding fifty rupees in the whole, as to such Magistrate seems reasonable.

Such allowance shall be payable from the date of the order.

If such person wilfully neglects to comply with this order, such Magistrate may, for every breach of the order, by warrant, direct the amount due to be levied in the manner provided for levying fines; and may order such person to be imprisoned with or without hard labor for any term not exceeding one month for each month's allowance remaining unpaid:

Provided that, if such person offers to maintain his wife on condition of her living with him, and his wife refuses to live with him, such Magistrate may consider any grounds of refusal stated by such wife; and may make the order allowed by this section notwithstanding such offer, if he is satisfied that such person is living in adultery, or that he has habitually treated his wife with cruelty.

No wife shall be entitled to receive an allowance from her husband under this section, if she is living in adultery, or if, without any sufficient reason, she refuses to live with her husband, or if they are living separately by consent.

537. On the application of any person receiving or ordered to pay a monthly allowance under the provisions of section five hundred and thirty-six, and on proof of a change in the circumstances of such person, his wife, or child, the Magistrate may make such alteration in the allowance ordered as he deems fit, provided the total sum of rupees fifty a month be not exceeded.



538. A copy of the order of maintenance shall be given to the person for whose maintenance it is made or to the guardian of such person; and shall be enforceable by any Magistrate in any place where the person to whom the order is addressed may be, on the Magistrate being satisfied as to the identity of the parties and the non-payment of the sum claimed.

Enforcement of order.

## PART XII.

### MISCELLANEOUS PROVISIONS.

## CHAPTER XLII.

### MISCELLANEOUS.

539. The procedure prescribed by this Act shall be followed, so far as it can be, in all miscellaneous criminal cases and proceedings which are instituted in any Court.

Procedure in miscellaneous criminal cases and proceedings.

540. Nothing in this Act shall be held to alter or effect the jurisdiction or procedure of the Magistrates or Commissioners of Police, or the Police in the Presidency towns except so far as this Act expressly provides for the same.

541. Nothing in this Act shall be held to alter or affect—

(a) the jurisdiction, or procedure of landholders specially empowered according to law in the Presidency of Bombay,

(b) the jurisdiction or procedure of the heads of villages in the Presidency of Fort Saint George,

(c) the jurisdiction or procedure of village Police officers in the Presidency of Bombay,

(d) the jurisdiction or procedure of any officer duly authorized and appointed under the laws in force in the Presidencies of Fort Saint George and Bombay respectively, for the trial of petty offences in military bazars at cantonments and stations occupied by the troops of those Presidencies respectively.

Saving of jurisdiction and procedure of Landholders, Heads of Villages, Village Police officers, Cantonment Magistrates.

## SCHEDULE I.

### ENACTMENTS REPEALED.

#### PART I.—STATUTE.

Year and Chapter.	Title.	Extent of repeal.
53 Geo. iii, cap. clv.	An Act for continuing in the East India Company, for a further term, the possession of the British territories in India, together with certain exclusive privileges; for establishing further Regulations for the Government of the said territories, and the better administration of justice within the same; and for regulating the trade to and from the places within the limits of the said Company's Charter.	Section one hundred and five.

#### PART II.—ACTS.

Number and year.	Subject or Title.	Extent of repeal.
V of 1841	An Act for the greater uniformity of the process upon trials for State offences, and the amendment of such process in certain cases.	The whole.
XV of 1843	An Act for the more extensive employment of Uncovenanted Agency in the Judicial Department.	Sections three, four, five and six.

**SCHEDULE I.**  
**PART II.—ACTS.—(continued.)**

Number and year.	Title.	Extent of repeal.
XV of 1845 ...	An Act for declaring and enacting the privileges of Native Officers and Soldiers of the Armies of the three Presidencies in respect of Judicial and Revenue proceedings.	So much as has not been repealed.
XXIX of 1845 ...	An Act to empower the Government of Bombay to appoint Joint Zillah Judges or Joint Session Judges.	Ditto.
VII of 1853 ...	An Act to extend the jurisdiction of Magistrates, under the 53rd Geo. iii, Cap. 155, Section 105, in cases of assaults, forcible entries, and other injuries accompanied with force, not being felonies.	The whole Act.
X of 1854 ...	An Act for regulating the powers of Assistants to Magistrates, and of Deputy Magistrates appointed under Act XV of 1843.	So much as has not been repealed.
XX of 1856 ...	An Act to make better provision for the appointment and maintenance of Police Chowkeydars in Cities, Towns, Stations, Suburbs and Bazars in the Presidency of Fort William in Bengal.	Section fifty-eight.
XXV of 1861 ...	An Act for simplifying the Procedure of the Courts of Criminal Judicature not established by Royal Charter.	So much as has not been repealed.
XVII of 1862 ...	An Act to repeal certain Regulations and Acts relating to Criminal Law and Procedure.	Ditto.
VI of 1864 ...	An Act to authorize the punishment of whipping in certain cases.	Sections eight, eleven and twelve.
XXVIII of 1867 ...	An Act to remove doubts as to the legality of certain sentences passed by tribunals, called Petty Sessions Courts, in the North-Western Provinces.	The whole Act.
XXXVI of 1867 ...	An act to correct an error in Act No. XVII of 1862.	Ditto.
VIII of 1869 ...	An Act further to amend the Code of Criminal Procedure.	Ditto.
XXVII of 1870 ...	To amend the Indian Penal Code.	Sections sixteen and seventeen, and the two schedules.
XIX of 1871 ...	An Act to provide for the appointment of Sessions Judges in Bengal and the North-Western Provinces.	Sections one, two, three, four, five and six.
Bombay Act VII of 1867 ...	An Act for the Regulation of the District Police in the Presidency of Bombay.	Section forty.

**PART III.—REGULATIONS.**

**BENGAL REGULATIONS.**

Number and year.	Title.	Extent of repeal.
IX of 1793 ...	A Regulation for re-enacting, with Alterations and Modifications, the Regulations passed by the Governor-General in Council, on the 3rd December 1790, and subsequent dates, for the Apprehension and Trial of Persons charged with Crimes or Misdemeanors.	Sections three, and thirty-four.

THE 11TH OF SEPTEMBER, 1872.

*Present :*

The Hon'ble F. B. KEMP, }  
 „ C. PONTIFEX, } *Judges.*

CASE No. 177 OF 1872.-

*Special Appeal from a Decision passed by the Subordinate Judge of East Burdwan, dated the 4th October 1871, affirming a decree of the Moonsiff of Chowkée Ousgram, dated the 25th July 1870.*

Meer Aftaboodeen and others ... (Defts.)  
*Appellants,*

*versus*

Shumsodeen Mullick (Plff.) Respondent.  
*For Appellant.*—Baboo Girijsa Sunker Mo-  
 zoomdar.

*For Respondent.*—Baboo Bama Churn Ban-  
 erjee.

It is not absolutely necessary under Section 25 Act VIII of 1859 that the boundaries of the land sued for should be set forth in the plaint; it is enough that there is a description sufficient to identify the land.

That the object of the Butwarra law being to divide the lands in as compact a manner as possible, one party may have to pay the jumma on a smaller area than the other, and it does not follow that the lands to be awarded to each party should be in exact proportion to the amount of jumma paid by them respectively to Government.

The facts of the case are clearly set forth in the judgment.

*Kemp, J., (Pontifex J., concurring).*—We think this Special Appeal must be dismissed. The plaintiff has purchased at a Government sale for arrears of revenue the share of the defendant No. 1 in an Ayma estate, No. 1104. The plaint alleges that the total area of the Ayma estate is 65 Bigahs 3c. 8g. paying a jumma to Government of Rs. 7-12-7 pie that the defendants 2 and 3 under Section 11 Act XI of 1859, made an application to the Collector to have the specific portion of land appertaining to their share, separated, that the Collector, accordingly, opened a separate account with the defendants 2 and 3; that subsequent to that proceeding which took place in 1865, the share of the defendant No. 1 which remained unprotected by Section 11, was sold for its own arrears and as the Government revenue was satisfied from the proceeds of that sale it was not necessary to sell the remaining shares. The plaintiff purchased the share of the defendant No. 1 at the auction sale, and he now sues alleging that the total area of the Ayma is 65 bigahs 3c. 8g., that the

defendants 2 and 3 having opened a separate account with the Collector under Section 11, according to the provisions of which Section they were bound to specify the lands contained in their share and the extent thereof, and as they had stated that their share comprised 33 bigahs 7 cottahs, that it followed that the remaining area, namely, the difference between 65 Bigahs 3c. 8. g. and 33 bigahs 7 cottahs, was in the possession of his predecessor the defendant No. 1 whose rights and interests he has purchased under Section 54 of the Sale Act, Act XI of 1859 and that he the plaintiff, as the purchaser of the share of the defendant No. 1 has acquired all the rights which were possessed by the defendant No. 1.

The written statement of the defendant is to the effect that the total area of the Ayma tenure was not 65 bigahs but 48 bigahs 12 cottahs, that on the total area the defendants 2 and 3 have opened a separate account of their share, namely, 23 bigahs 7 cottahs which they hold under defined boundaries, and separate from the defendant No. 1, and that the defendant No. 1, whose rights the plaintiff has purchased, was in possession of the remaining lands; namely, 15 bigahs also within defined boundaries. There were other defendants in the case who set up a claim to a portion of the claim under a Lakheraj title; they set forth their title clearly and within definite boundaries, and with reference to their claims both Courts have found that the Lakheraj land must be excluded from calculation, and both Courts have given the plaintiff a modified decree against the defendants Nos. 2 and 3. The grounds of special appeal are that this suit is virtually a suit for partition of a revenue paying estate, and therefore that the Civil Court has no jurisdiction to entertain it. 2ndly, That the plaintiff not having stated the boundaries of the land claimed, his suit should not have been entertained by the Lower Court. 3rdly, That the decree was incapable of execution, and, lastly, that if there is any excess over the 48 bigahs stated by the defendants to be the total area of the Ayma Mehal, the excess ought to be given to the plaintiff and defendants in proportion to the jumma paid by them respectively to Government. We think that the first ground is not tenable. This is not a suit for partition, the defendants Nos. 2 and 3, as already observed, have separated

themselves in so far as the protection of their shares is concerned from sale by reason of the default of the joint proprietors, by proceeding under Section 11 Act XI of 1859. The present plaintiff did not sue to have a redistribution of shares with a specific jumma apportioned to each share, but this suit is for possession of the lands in the former occupation of the defendant No. 1, whose rights and interests the plaintiff has purchased.

On the second ground that the boundaries have not been stated in the plaint, it is sufficient to say that under Section 25 of Act VIII of 1859, what it is necessary for the plaintiff to do is to describe the property in such a manner as may suffice for its identification; it is not absolutely necessary that the boundaries should be set forth and as long as the land can be identified, it is sufficient and there is in this case a sufficient description. We, therefore, overrule this objection. We also think that the decree is capable of execution. Under Section 11 of Act X under which the defendants Nos. 2 and 3 opened a separate account with the Collector, they are bound to specify the boundaries of the lands comprised in their share, and we must assume they did so, for there is the Collector's proceeding of 1865 on the record, stating that the provisions of the Act were complied with and that a separate account was consequently opened under the provisions of Section 11. Therefore the Lakheraj lands having been defined and the claim of the Lakherajdar defendants having been admitted within defined boundaries, any excess over the 33 bighas 7 cottahs held by the defendants 2 and 3—minus the lands awarded to the Lakherajdars—can be given possession of to the plaintiff, and the plaintiff already being admittedly in possession of 15 bighas odd cottahs, the balance may be made over to him.

With reference to the last ground, namely, that the excess lands ought to have been given to the plaintiffs and to the defendant Nos. 2 and 3, in proportion to the amount of their respective jummas, it has been found by the Lower Appellate Court that the lands in the occupation of the defendants 2 and 3 are more valuable than the lands in the occupation of the plaintiff; the lands held by the defendants are apparently homestead lands in the immediate vicinity

of homestead lands, and the lands held by the plaintiff are lands of a less valuable description and do not pay so high a jumma as those of the defendants. In every case of a Butwara it does not follow that each party will have awarded to him the same quality of land. It often happens that one party gets more lands or less land, but of a more valuable quality than the other party; the reason being that the object of a Butwara is to divide the lands in as compact a form as possible. One party may have to pay the jumma on a smaller area than the other, and it does not follow that the lands to be awarded to each party should be in exact proportion to the amount of jumma paid by them respectively to Government.

On the whole case, we think, that the decision of the Court below is a right decision, and we dismiss this appeal with costs.

THE 11TH SEPTEMBER, 1872.

*Present:*

The Hon'ble F. B. KEMP, } ... Judges.  
„ C. PONTIFEX, }

CASE NOS. 213 AND 214 OF 1872.

*Miscellaneous Special Appeal from a Decision, passed by the Judge of Mulnapore, dated 13th April 1872, reversing an order of the Moonsiff of Mulnapore, dated the 11th March, 1872.*

Woodoy Chand Ghose and } Judgment-debtors,  
Deno Paraye } Appellants,

*versus*

Chinta Monee Chowdhry... Decreeholder, Respondent.

*For Petitioner.*—Baboo Ashootosh Mookerjee.

*For the Opposite Party.*—Baboo Moti Lal Mookerjee.

When it is proved to the satisfaction of the Court of first instance that a defendant was prevented by a sufficient cause from appearing when the suit was called on for hearing, on the second day, although he had appeared on the first day of hearing, the judgment passed on the second day of hearing is an ex-parte judgment and the Court of first instance has jurisdiction under Section 119 Act VIII of 1859 to set aside such judgment and appoint a day for proceeding with the suit.

The facts may be safely gathered from the judgment.

*Kemp, J., (Pontifex, J., concurring.)*—It is admitted that one judgment will govern

these two cases. The judgment-debtor was sued by the opposite party for enhancement of rent. In that case the agent of the plaintiff appeared and gave his evidence; upon this, the Deputy Collector in his judgment observed, "that notwithstanding the issue of the usual summons and the execution of a Mookhtarnamah by the defendant, the defendant had taken no further notice of it, and that as the plaintiff's case was sufficiently proved, he decreed the case ex-parte in favor of the plaintiff with costs." Under this decree, the jamma of the defendant, appellant before us, has been enhanced three-fold. The defendant then applied for a restoration of the case to the file under section 119 of Act VIII of 1859. The Moonsiff, after taking the evidence, adduced by the defendant in support of his allegation, that he was prevented by sufficient cause from appearing when the suit was called on for hearing, set aside the ex-parte judgment passed by the Deputy Collector and appointed a day for proceeding anew in the suit.

On appeal the Judge was of opinion, that the decree is not an ex-parte one, for the defendant in the rent-suit was represented on the first day of hearing, and, therefore, the fact of his not being present or represented on the 2nd day of hearing, cannot turn the order into an ex-parte one, and this being the case, the Moonsiff acted without jurisdiction in allowing a rehearing under section 119. He accordingly reversed the order of the Moonsiff.

We think this decision is wrong in law, Section 119 enacts that no appeal shall lie from a judgment passed ex-parte against a defendant who has "not appeared." The Section then goes on to say: "But in all cases in which judgment may be passed ex-parte against a defendant" (and here the words "who did not appear" do not occur), that defendant may apply within a reasonable time not exceeding 30 days, after any process for enforcing that judgment has been executed, for an order to set it aside, and if it shall be proved to the satisfaction of the Court, either that the summons was not duly served, or that the defendant was prevented by any sufficient cause from appearing when the suit was called on for hearing, the Court shall pass an order to set aside the judgment and shall appoint a day for proceeding with the

suit." We mark the difference here, that in the first part of the section it is said, that no appeal shall lie from a judgment passed ex-parte against a defendant who has not appeared, while in the latter part of the section, the law says that a defendant (generally), who is prevented by sufficient cause from appearing when the suit was called on for hearing, may apply. Now, in this case there can be no doubt that the Moonsiff has found on the evidence, that the defendant was prevented by the fraud of the plaintiff who induced him by false promises of coming to an amicable arrangement, and that he would take rent from him at the old rate for his tenure, from appearing when the suit was called on for hearing. We, therefore, think that the suit having been decided ex-parte and the defendant having proved to the satisfaction of the first Court, that he was prevented by sufficient cause from appearing when the suit was called on for hearing, the Moonsiff was perfectly right in setting aside the ex-parte judgment and appointing a day for proceeding with the suit. We, therefore, reverse the decree of the Lower Appellate Court, and affirm the order of the first Court restoring the case to the file.

The suit will accordingly go back to the first Court for a re-trial, and these appeals will be allowed with costs.

Pleader's fees 1 Gold Mohur.

THE 18TH SEPTEMBER, 1872.

Present :

The Hon'ble Sir R. COUCH, Kt., Chief Justice

" W. AINSLIE,.....Judge.

CASE No. 336 OF 1872.

*Special Appeal from a Decision passed by the Offg. Judge of Gyah dated the 30th September 1871, affirming the decree of the Sub-ordinate Judge of that district, dated the 28th January 1871.*

Doolee Chand for self and

as guardian of Dergo

pal Lall and Kunhoya

Lall, minors

... (Defults.) Appellants.

versus

Musst. Oomdah Begum... (Plff.) Respondent.

For Appellant.—Baboo Kally Mohun Doss.

For Respondent.—Mr. R. T. Allan.

It cannot be held that omission on the part of the Appellate Court to give reasons for its decision under Section 359, Civil Procedure Code, may have produced an error or defect in the decision of the case upon the merits.

2. Where it appears to be necessary that the first Appellate Court should fully state the reasons for its decision. The proper course is not to reverse the decree but to require the Judge of the Appellate Court to state the reasons.

3. Where the Appellate Court adopts the conclusions arrived at by the first Court, the High Court cannot interfere in special appeal.

It is not necessary to set out any facts in this case as the decision turns only upon the construction of Section 359, Act VIII of 1859.

*Couch, C.J., (Ainslie, J., concurring).—*Section 359 of Act VIII of 1859 directs that the judgment shall contain the point or points for determination, the decision thereupon and the reasons for the decision; and where the judgment does not contain them, it may be said that there is an error in the procedure. There is no error in the investigation of the case or in the decision, as the case may be perfectly well decided, although the reasons are not stated in the judgment; I think, we must suppose that the Judge has made up his mind, before he proceeds to write his judgment, before he finally writes it. Then is a ground for a special appeal. An error in the procedure is so when it may have produced error or defect in the decision of the case upon the merits. It does not appear to me it can be held that the omission to give the reasons may have done this, and therefore I cannot consider it a ground for a special appeal; and for reversing the decree and remanding the case for re-trial, I cannot agree in those decisions in which that appears to have been done, and the party appealing to this Court has had a re-trial or re-hearing of the case simply because the Judge has not in the first instance given the reasons for his decision. At the same time it is important that this Court should see what the reasons of the appellate Court were, so that it may be able to decide whether there has been any substantial error in its decision, and in cases where it appears to this Court to be necessary that the Appellate Court should fully state the reasons for the decision, the proper course it seems to me would be not to reverse the decree, but to require the Judge of the Appellate Court to state the reasons. The Court would retain the case on special appeal, but it would return the proceedings to the Lower Court, and require the Judge to state the reasons. There may be cases where that

could not be done, in consequence of the death of the Judge or of his removal, but where it can be done, that is the course which ought to be adopted.

In the present case, when we consider the judgment which Mr. Allan has read, by which the Judge sent the case back to the first Court for certain matters to be inquired into, and read the judgment now appealed against by the light of the first judgment, I do not see any reason for being dissatisfied with what the Judge has said. He seems to have considered the case and he adopts the conclusions which had been come to by the first Court; he says that he considers them to be correct. In this case, therefore, I see no ground for even sending the case back and requiring him to state his reasons in detail, and as I have said already, certainly no ground for reversing his decision.

In regard to the other point, we have already expressed our opinion that the objection cannot prevail. No authority has been produced to us for what was contended for on the part of the Appellant. The appeal must be dismissed with costs.

THE 17th SEPTEMBER, 1872.

*Present :*

The Hon'ble F. B. KEMP, } *Two of the*  
  } *Judges of this*  
  } *Court.*  
  } C. PONIIFEX,

CASE No. 437 of 1872.

*Special Appeal from a Decision passed by the Judicial Commissioner of Zillah Chota Nagpore, dated the 7th October 1871, affirming a decree of the Deputy Commissioner of Hazareebaugh, dated the 9th June 1871.*

Tekait Churaman Sing, ... (Plf.) Appellant,  
versus

Roop Chand Chesar and  
another ... (Def.) Respondents.

*For Appellant.*—Mr. Woodroffe and Baboo Tarucknath Dutt.

*For Respondent.*—Baboo Kallymohun Doss and Mohiney Mohun Roy.

In a *Bukhlash-namah* or deed of grant for a consideration the absence of the words *Nuslan* and *Nuslan*, and *faraaidan* does not limit the grant to the term of the national life of the grantee when there are in the deed other words which clearly point to the contrary.

In this appeal, the decision turns upon the construction to be put upon the deed of

Bukshishnamah granted by the grand father of the special appellant to the father of the special respondent.

The deed is dated the 4th of May 1821. The grantee remained in undisturbed possession up to 1275, or for 47 years from the date of the grant.

The grantee applied to the Collector for mutation of names on the Towjee or Government Rentroll, and an order was passed by the Collector after due notice to the grantor, by which order the name of the grantor was expunged from the rent-roll and the name of the grantee substituted for the same.

The object of the present suit is to have it declared that the grant is a life-grant.

Both the Lower Courts have found that the grant is not a life-grant, but one which conveys hereditary rights.

Mr. Woodroffe, who appears for the special appellant, contends that in the absence of specific words, such as "*nuslân bád nuslân*" "*furzundân bad furzundân*," the deed cannot be construed to create hereditary rights. Several decisions of this Court and of the Privy Council which refer to leases were referred to in the course of the argument. It was also contended that there was some oral evidence which went to prove that the grantee during his life-time had by his acts shewn that he considered the grant to be one which did not cease beyond the term of his life.

We have carefully considered this deed. It appears that a former Rajah, the grand-father of the special appellant, made a gift of the village in dispute which bears a separately recorded Government rental of 16 Rupees per annum to the father of the special respondent for a consideration of sicca Rupees 1,375. The deed was registered by the Caze and its execution is not disputed. The present valuation put, it must be remembered by the plaintiff, on the property, is Rs. 3,400. The price paid nearly 50 years ago must be considered, looking to the very great increase which has taken place in the value of landed property in this country, to be an adequate price.

The words of the deed are clear. The grantor states "that in exchange for Rupees 1,375 I have given you, the grantee, the village, and have caused you to be put in possession." Then these words occur, viz.

"Neither I nor those who will stand in my stead, that is my successors, have now, or shall ever have, under any circumstances or from any cause whatever, any right, demand or contention, in respect of the said village."\*

In the cases referred to by the learned Counsel, the proprietary title remained in the lessor, in the present case that title is absolutely alienated and is vested in the grantee. We are, therefore, of opinion that the Lower Courts have correctly construed this document.

Mr. Woodroffe read the evidence which, it is alleged, bears upon the conduct of the grantee. The witnesses who are dependants of the grantor state that they heard the grantee say that he had only a life interest in the property; such evidence, even if it were admissible, is obviously untrustworthy.

The special appeal is dismissed with costs.

### In the High Court of Bombay.

THE 4TH DECEMBER, 1871.

Present :

MELVILL, ..... } Judges.  
KEMBALL, ..... }

SUIT No. 59 OF 1870

*Regular Appeal from the decree of the Subordinate Judge of Ahmednagore in suit No. 1897 of 1861.*

Kakaji bin Ranoji and others (Defts.) Appts.  
versus

Bapuji bin Madhavrav (Plff.) Respondent.

For Appellant—Babu Shantaram Narayan.

For Respondent—Dhiraj Lal Mathura Das.

Held with reference to Sec. 7 Act VIII of 1850 if the cause of action in the first suit is the same as that in the second suit, then the second suit is barred in respect of any portion of the claim omitted from the first suit. Where the first suit was registered on the ground of its not including the whole claim there is no legal bar to a second suit for the whole property; the causes of action being distinct.

Held that it is sufficient for Plaintiff to shew that he and the Defendants are the only representatives of the person who last held the property in dispute.

Held that there is no legal bar to the award of waqfat or interest for the period during which a suit is pending, however long that period.

It appears that in 1856 plaintiff brought a suit for his one-third share of a half of the *deshmukhi* allowances in a particular

\* This is a literal translation.



Perganna reserving to himself the right of suing for a share of the same allowances in other places. The suit was finally thrown out by the Sadar Court in appeal upon the ground that the plaint was bad in consequence of the reservation it contained. The present suit was accordingly brought in September 1861 for the plaintiff's whole share in the ancestral property.

The defendants pleaded that the suit was barred; that according to the family custom the subject matter of the suit was indivisible.

The Subordinate Judge overruled the plea in bar of the suit, and decreed the claim with means profits from date of suit to the date of execution.

It was contended on behalf of the appellants that the suit was barred under Section 7 of Act VIII of 1859.—That plaintiff was bound to prove his descent from the original grantee and to shew what was the share of each of his other surviving heirs and that the Lower Court was suing in awarding means profits for more than six years.

It was argued per contra—that Section 7 Civil Procedure Code did not apply, as the suit was instituted before it came into operation—that the causes of action in the two suits were distinct, that plaintiff has proved that the property claimed was last held by the common ancestor of plaintiff and defendants and that there was no law which limited the award of wasilat to six years after the institution of a suit.

*December 11th Melvill J. (Kemball J. concurring):*—This is a suit for partition of the land and emoluments attached to a *deshmukhi watan*.

A preliminary objection has been taken that the claim is in part, if not entirely, barred by Sec. 7 of Act VIII. of 1859, the plaintiff having in a former action sued for a portion of the lands which he now claims.

The former suit was brought in 1856, and was decided by the Sadr Divani Adalat in 1857. The plaint has not been produced before us, but from the judgment it appears that the plaintiff sued the present appellants to recover from them the third share of the *deshmukhi hats* in the *pargana* of Sinner, at the same time reserving to himself the right to sue at a future time for a share of the same allowances in other *parganas*. The final judgment of the Sadr Adalat was in these terms:—The Court, concurring in opinion with the Judge who

admitted this special appeal, that the Zilla Judge ought to have read exhibit No. 14 in conjunction with exhibit No. 83, and that Bapu is not thereby precluded from suing for his share of the *watan*, find, however, that he has only sued for a portion of his share, and not for his whole share, which it is requisite for him to do, as no division has yet taken place in the family. The Judge's decree, therefore, so far as it throws out Bapu's claim as being improperly brought, is affirmed."

From the judgment it is clear that the Sadr Adalat declined to enter into the merits of the claim. They rejected the claim on the ground that an action in that form was not maintainable, and they at the same time pointed out to the plaintiff the proper course for him to adopt.

He has now adopted this course, and it would certainly be strange and but little creditable to our system of procedure, if we were obliged to hold that the present action is barred by the former suit, in which nothing was decided except that the present action was the remedy to which the plaintiff should resort.

There has been much argument at the bar on the question whether Sec. 7 of Act VIII. of 1859 can affect this case, seeing that the former suit was brought and decided before the Code of Civil Procedure was enacted. The Judicial Committee of the Privy Council seem\* to have held the section applicable under such circumstances, and we are informed that a Division Bench of this Court followed that precedent in S. A. No. 314 of 1866 (c), decided on the 26th August 1867. Were it necessary for us to decide this question, the great respect which we feel for every decision of the Privy Council would induce us (if we were satisfied that it was their deliberate intention to give retrospective effect to a provision of a statute affecting not only procedure, but rights) to find the best reasons we could for a decision which we should feel bound to follow, but which, standing, as it now does, unexplained, appears to be not easily reconcilable with the established rules for the construction of statutes. But

\* *Moonshee Buzoor Rubeen v. Shamsunnessa Begum*, 11 Moo. Ind. App. 351; 5 Orla. W. Rep. F. C. 3.

(c) *Maharajah v. Krishnarao*.

we are happy to be spared the necessity of so doing, as we are of opinion that, even if it be admitted that Sec. 7 is applicable, it does not in any way bar the present suit.

That section says that "every suit shall include the whole of the claim arising out of the cause of action."

\* \* If a plaintiff relinquish, or omit to sue for, any portion of his claim, a suit for the portion so relinquished shall not afterwards be entertained."

Now, evidently the first thing to be considered, in applying this section, is whether the cause of action in the second suit is the same as in the first. If so, but not otherwise, the second suit is barred in respect of any portion of the claim which was omitted from the first suit.

In the present case it seems quite clear to us that the plaintiff's claim does not arise out of the cause of action which was put forward in the former suit.

In the former suit the plaintiff's supposed cause of action was a right, as a member of an undivided family, to demand a share of a particular portion of the family property, and to leave the rest undivided. In the present suit, his cause of action is a right to have the whole family property (whether held by himself or others) brought together and divided. So far from these two being the same cause of action, they present all the difference which is expressed by saying that the one is cause of action, and the other is no cause of action. If the former suit had been for a general partition, and the plaintiff had omitted to include in his claim the whole of the family property, there would have been some ground for the appellant's objection.

As was suggested by Mr. Justice Kimball in the course of the argument, the case is analogous to that of one of several partners who sues another partner for his share of the profits arising out of one particular partnership transaction, and is told that his proper course is to sue for a dissolution and an account. Could it be said that a suit for dissolution, and a general distribution of assets and liabilities among all the partners, was founded on the same cause of action as a suit of which the object was a continuance of the partnership, and the settlement of a single item in dispute between two of the partners?

Being of opinion that the cognisance of the suit is not barred by Sec. 7, we have

further come to the conclusion that the plaintiff is entitled to succeed on the merits.

The suit was originally brought against the four appellants, who, together with the plaintiff, are the only descendants of Mādhavrāy, by whom it is admitted that the whole *watan* was held. The defence of the appellants was that there were a number of other shares, remote relatives, and representatives of two other branches of the family; and it is contended that the plaintiff was bound to trace back his genealogy to the original grantee of the *watan*, and to prove that no other descendants of that grantee, except himself and the appellants, are in existence. We do not think that he is under any such obligation. *Prima facie* it was sufficient for him to show that the whole *watan* was held by Mādhavrāy, and that he and the appellants are the only representatives of Mādhavrāy. Twelve other persons named by the appellants as co-sharers have been joined as defendants, and it is for them to show that they have any rights which operate to restrict the plaintiff's *prima facie* right to treat as the exclusive property of himself and appellants property which has for a great number of years been managed exclusively by them and their common ancestor Mādhavrāy.

The case set up by the appellants is that, in accordance with a family custom, they, as representatives of the eldest branch of the family, are entitled to the exclusive management of the *watan*; that the plaintiff and the distant relatives who have been joined as defendants are entitled to maintenance and nothing more; and that the plaintiff, having had three villages assigned to him for his maintenance, has no claim to anything more. There is no proof whatever of the existence of any such family custom. Of the twelve persons named by the appellants as co-sharers, ten only have appeared. Of these, three (witnesses Nos. 292, 294, and 295) know nothing about any maintenance having been paid out of the *watan* to their branch of the family. The rest declare that payments have been made to them for maintenance, and they are to a certain extent corroborated by the plaintiff's witness No. 223. Receipts for these alleged payments are also produced by the appellants (exhibits 94 to 141). We consider that this evidence is not sufficient to establish

any right of these defendants to share in the *watan*. The receipts have all been given since the plaintiff's claim to a third share was first made, and the wording of the receipts clearly shows that at the time when the receipts were written, it was in contemplation to use them for the purpose of resting the plaintiff's claim. They are, therefore, of little or no value. The statements of the defendants as to the payments made to them are very loose and vague. They do not say that they received any fixed annual sum for maintenance, but that when they wanted ten or twenty rupees for their expenses, they received it from the first appellant or his father. Considering the extreme care which the sharers in a *watan* ordinarily take to define and to exact their full rights, we can hardly regard such a statement as credible. Such a primitive mode of dividing the proceeds of the *watan* might be intelligible if the defendants had been living together as a united family, but in point of fact they have been scattered about in different parts of the country for years, if not for generations. Their names are not entered in the Government books as sharers in the *watan*, and they have never had any voice in the management of the *watan*. The appellants now put forward these defendants as sharers in the *watan*; but it is shown that during the interval between the suit of 1856 and the present suit the appellants negotiated with the plaintiff on the basis that they and the plaintiff were the sole proprietors of the *watan*. On the whole, we do not think there is any satisfactory proof either that there are any sharers in the *watan* except the plaintiff and the four appellants, or that any payments have been made by the appellants for which they are entitled to credit in the calculation of mesne profits.

The defendants who were subsequently joined in the suit did not appeal against the decision of the Subordinate Judge; but at the last moment, when the Pleader for the

appellant had almost concluded his reply, an application was made on their behalf that they might be joined as appellants. This was, of course, refused; but they have not, in fact, been at all prejudiced by the refusal. They have had the full benefit of Mr. Shántarām's able argument, the whole object of which was to establish the rights of those defendants whom he did nominally represent, and thereby to procure the rejection of the claim against those for whom he appeared.

We think that the plaintiff is entitled to the share claimed by him, and to mesne profits from the date of suit till the date of execution. Mr. Shántarām has contended that mesne profits cannot under any circumstances be awarded for a longer period than six years; but we know of no provision of any law of limitation which prevents a court from awarding mesne profits or interest during the whole period for which a suit is pending, however long that period may be. We should be very sorry if any penalty of the kind were imposed upon the victims of the dilatory action of our courts. Another objection which Mr. Shántarām has taken in the matter of costs appears to us equally unsustainable. He contends that, in his valuation of the suit, the plaintiff ought not to have included the value of the three villages in his possession, since he was not suing for a share of those villages; but in fact he was suing for his share of the whole family property, and it was both right and necessary that he should bring into account, as the subject-matter of this suit, the whole of the property, whether held by himself or the defendants.

We affirm the Subordinate Judge's decree, and award mesne profits (to be determined at the execution of the decree) from the date of the institution of the suit till the date of execution, with costs throughout on the appellants.

*Decree accordingly.*

## SEPTEMBER, 1872.

V. H. SCHALCH, Esq.

## ERRATA.

Above Circular Order No. 10 of August 1872, add "V. H. SCHALCH, Esq., and" before "A MONEY, Esq., C.B."; and above Circular Order No. 11, enter "A MONEY, Esq., C.B."

## No. 1.

It has been ruled\* by the Government of India, Financial Department, that in future the expenditure to be incurred on account of considerable undertakings for the improvement of Government estates must be budgetted for like any other works.

2. Under instruction from Government the member in charge requests, therefore, that local officers will "send up budget demands for such works for the ensuing year in good time, after consulting Public Works Department officers and procuring necessary details. Such expenditure will be imperial, and will be kept apart from provincial estimates."

3. It is presumed that in most districts the budgets for 1873-74 will have been submitted before the receipt of these orders, but charges to be admitted under the Government Resolution above alluded to may be included in supplementary budgets, which are now receivable up to the end of November next.

## No. 2.

With reference to para. 1 of the revised settlement rules, which have been circulated with orders No. 419B, dated 24th July 1872, Section IX, Chapter VIII, page 154, of the Board's Rules, is hereby cancelled.

## No. 3.

In clause 5, Chapter II, Section X, at page 31 of the Board's Rules, for the words "at the commencement" in line 2, substitute the words "on the last day."

## No. 4.

The following is added as clause 8 B, at page 284, Board's Rules:—

"Possession assumed under the last preceding rule should be merely temporary until it has been ascertained whether or not the channel round the island is fordable throughout the year. If the channel be found to be not so fordable, the land should be considered the property of Government and should be settled."

A. MONEY, Esq., C.B.

## No. 5.

Is recently submitting to Government

Department for the official year 1871-72, the Member in charge found it necessary to record the following remarks:—

"Notwithstanding the special instructions issued by the Board to District Officers in Circular Order No. 8 of September 1869, the explanations regarding the fluctuations in the revenue furnished to the Superintendent of Stamps by local Officers have generally been found very insufficient, so much so that the Superintendent reported his inability to supply for the Annual Report the reasons of increase and decrease in the respective districts. More stringent orders will now be issued to District Officers to furnish their explanations at the close of each year in a form to be especially prescribed by the Board, and to submit copies of those explanations to the Board."

2. It was apparent, in most instances, upon reference to the original returns rendered to the Superintendent of Stamps, that the explanations offered by Treasury Officers had been sent on without any examination or revision such as ought to have been made by the District Officers in view of the means at their disposal of ascertaining full particulars of all causes of fluctuation in the stamp revenue in their respective Districts, which Government expect to be properly and fully explained.

3. District Officers are now specially requested, in continuation of para. 2 of Circular Order No. 8 of September 1869, to give their careful attention to the submission of intelligent and complete explanations in the monthly returns sent to the Superintendent of Stamps, regarding any increase or decrease in the sales of each description of stamps. To secure uniformity, the Member in charge desires that the explanations at the close of each year be submitted in the underrated from:—

DESCRIPTION OF STAMP.	AMOUNT OF		Brief Explanation of Cause.
	Increase.	Decrease.	
Adhesive, including Receipt, Revenue, Share Transfer, Foreign Bill, and Customs Stamps.	Rs.	Rs.	
Hoondie or Bills of Exchange, including Bills of Lading Stamps.			
Judicial, including bicolor and adhesive "Court Fees" Stamps.			
Non-judicial, including bicolor non-judicial Customs and Salt Bond, Waste land Dec and Sulphur and Arms License Stamps.			

One copy should be sent direct to the

this Office, to which a *quarterly* Return, in the same form, should also be submitted *through the Commissioner*. No copy of the "*quarterly*" Return is required for the Superintendent of Stamps, to whom monthly returns are furnished.

V. H. SCHALOW, Esq.

No. 6.

As all settlements now require the sanction of the Board of Revenue, Return No. XIII is no longer necessary, and should be expunged from the "List of Returns" at page 262 of the Board's Rules.

No. 7.

In the first line of para 18, Section I, page 341, Board's Rules, substitute the words "monthly accounts current" for the words "monthly bills," and expunge the last clause in the para. beginning "and an account current, &c."

A. MONEY, Esq., C.B.

No. 8.

AFTER the words "this year" in line 7 of Circular Order No. 7 of August last, insert the words "upon his income during the year ending 31st March 1872 (*vide* column 4 of Form C prescribed in Financial Resolution No. 2887 of 19th April 1872) provided that, in the case of a person first becoming chargeable under this part within the year of assessment, or within the year next before such year, he may be assessed."

No. 9.

For the present form of certificate in Chapter XXI, Section II, Clause 5, pages 304 and 305, of the Board's Rules, substitute the following:—

I do hereby certify that I have personally counted the stamps in store at the *Sudder or Head Quarters Station of the District*, on the \_\_\_\_\_, the actual value of which is \_\_\_\_\_ Rupees\*, and that the Rules prescribed in Chapter XXI of the Rules of the Board of Revenue are duly observed in the District.

I also hold similar certificates as to the stamps at all Sub-Divisions in the District having been counted by the officers concerned on the dates as per margin, the actual value of which is Rupees\*.

I further certify that I have compared the balance as shown by this Account with the balance shown in the Memorandum at foot of the Monthly Cash Account of this office for \_\_\_\_\_ and that they agree. (Where they do not agree, substitute, "and that they disagree to the extent of \_\_\_\_\_." I am enquiring into the cause of this difference.")

N. B.—In Districts where there are no Sub-Divisions, the words in italics in para. 1. and the whole of para. 2, of the above form of Certificate are to be omitted.

No. 10.

In continuation of Circular Order No. 11 of April 1872, the following orders of the Government of India, Financial Department, No. 2025, dated Simla, the 15th August 1872, addressed to the Chief Secretary to the Government of Bombay, are published for general information:—

I am directed to acknowledge the receipt of your letter No. 3099—21 AR, dated 1st July 1872.

2. It appears that the Government of Bombay has sanctioned the refund of the excess stamp duty paid on Letters of Administration of an estate the assets of which were subsequently proved to be less than what they had been estimated to be at the time duty was paid; and it is suggested that as the Court Fees Act, 1870, does not authorize the grant of refunds of stamp duty under such circumstances, provision might be made by law to meet similar cases in future.

3. In reply, I am to say that the Governor-General in Council confirms the sanction accorded by the Local Government to the refund of the excess duty paid, but that His Excellency in Council does not consider it expedient to legislate on this point at present. The suggestion of the Bombay Government will, however, be borne in mind whenever the law is revised.

4. In the meantime, the Local Governments may sanction refunds of stamp duty when the estimate of the assets of an estate is shown to have exceeded the amount on which the Act says that duty shall be paid, viz., the actual value of the property in respect of which the Letters of Administration are granted.

No. 11.

DISTRICT Officers are informed that the figures entered in their Budget Estimates for 1873-74, now coming in, on account of "discount on sale of Court Fees Stamps" in that year, will all be expunged before transmission of the Estimates from this office to the Accountant-General of Bengal; as, with reference to para 6 of the Rules printed with the Board's Circular Order No. 8 of June last, no discount on the sale of Court Fees Stamps will be payable when those Rules come into effect.

\* NOTE.—Here enter the amount in words and figures.



THE  
**LAW OBSERVER.**

Vol. II.]

JANUARY 15, 1873.

[No. 1.]

*A Conflict.*

It is said that our books of reports contain much bad law. We heard a friend once irreverently compare them to the witches' cauldron in the play. We wish we could say that there was no foundation for these unsavoury similes, but it would be impossible to do so in the face of the deliberate admission of Mr. Justice Louis S. Jackson in his recent minute on the administration of justice. But the remedy, which has been suggested, appears to us to be worse than the disease. It has been gravely proposed to place the law reports, especially the *Weekly Reporter* on the index, so that no lawyer may refer to them in his argument. Mr. Stephen, we believe, was the first to suggest the suppression of these publications. In remodelling the statute book he saw he had but half done his work. The position of the District Judge must be made still more comfortable. Much reading of the law reports was a weariness of the spirit, and these publications were denounced with a vehemence which must have gladdened the heart of the overworked District Judge. It is, however, impossible to avoid the suspicion that Mr. Stephen's denunciation owed much of its fervour to the quantity of bad law which has found a questionable immortality in the pages of the *Weekly Reporter*. Indeed the unfortunate reporters have been made to fill the office of whipping boys. It does not require any argument to show that it is hardly fair to hold the reporter responsible for the bad

law which finds a place in his reports. It is his duty to report any case which decides an important question of law, and if the ruling should happen to be erroneous, it is surely not *he* who should be called to account. Indeed in a certain sense the publication of an erroneous ruling would seem to be desirable. It would then be sure to attract the attention not merely of lawyers but of the general public, and in this country where there is nothing like a strong professional opinion, this circumstance is of itself an immense advantage.

These remarks have been suggested to us by some very recent judgments of the High Court. In the present article we shall refer to only one of these judgments, viz. that reported at page 34 of the 18th Volume of the *Weekly Reporter*. The question raised in the appeal was whether the Court in execution could award any interest on costs, the decree itself making no provision for the payment of such interest. The judgment is a very short one, and we need not make any apology to our readers for giving it in this place.

"*Kemp J.*—The question raised in this appeal is whether the costs in the suit are to bear interest or not. We may observe that this point was not raised below, and has been raised for the first time in this Court. The decree is silent as to awarding interest on costs, but it has been the practice of this Court to award interest on costs on the ground that costs generally carry interest without any distinct order to that effect being



required. There are two decisions to that effect to be found in Volume I, *Weekly Reporter*, Miscellaneous Rulings, page 1, and in Volume II, Miscellaneous Rulings, page 21. There is no ruling that we can find, nor has any such ruling been brought to our notice which rules otherwise, and the ruling of the Full Bench which has been quoted by the pleader of the appellant is, we think, inapplicable to the facts of this case. The question there decided was whether interest could be awarded on the principal sum decreed or on the subject-matter of the suit when the decree is silent on that point, and the Full Bench decided that it could not, but there was no ruling as to interests on costs. Moreover, interest on cost is not of the same character as interest on the subject-matter of the suit. Costs, as observed by Mr. Justice Glover in the course of the argument, are advanced by parties from time to time during the progress of the suit, and when a party succeeds in a case, he is, we think, entitled to interest upon any sum duly and fairly spent by him in litigation. We hold, therefore, that, as a general rule, unless it is distinctly stated in the decree that no interest is to be given on the costs, we ought to award them. The appeal is dismissed with costs."

There is, however, a case to be found at page 302, 16 W. R., in which the law is differently laid down. In that case Mr. Justice Glover is reported to have said:—"Two questions are raised in this appeal. The first is that interest ought to have been allowed to the successful appellant in the Privy Council, upon the costs awarded to him. \* \* \* \* \* On the first point *there can be no doubt*. This Court is now executing the decree of the Privy Council. That decree makes no mention of interest to be allowed on the costs, and we cannot supplement it by the addition prayed for. The point has been ruled in the case of *Modhusoodun Lall*, reported in 3 W. R., Full Bench Rulings, p. 109.

Our readers will have observed that the learned judge, who gave judgment in

this case, was a party to the decision in the 18th *Weekly Reporter*.

The uncertainty of the law has passed into a proverb, but no where, we believe, is that uncertainty so well illustrated as in the pages of the *Weekly Reporter*. The two decisions which we have cited above are manifestly inconsistent and cannot stand together. The law of contradictories is no respecter of persons. One of the two rulings must be erroneous, and the answer to the question, which of the two is erroneous, is furnished by the Full Bench Ruling reported in the VI *Weekly Reporter*. The elaborate judgment of Sir Barnes Peacock in that case leaves very little doubt that the law has not been correctly laid down in the later case. If the learned Judges who decided the case in the XVIII *Weekly Reporter* had referred to the earlier case they would have found that the circumstance of costs being advanced from time to time was perfectly immaterial to the determination of the question before them. The truth of Mr. Justice Jackson's observation, that the wheat does not always happen to be well separated from the chaff will occur to every one who reads this judgment. We have the highest respect for the learned Judges by whom the case was heard. But we thought we should not discharge our duty if we failed to criticise the judgment out of deference to the learned judges. The case is by no means exceptional in its character. Indeed it would not be perhaps too much to say that almost every number of the *Weekly Reporter* contains some questionable law. But, as we have already observed, the reporter is not to blame. By suppressing the reports we should only "scotch the snake, not kill it."

### Correspondence.

WHAT DOES "LAND" MEAN AND INCLUDE IN ACT X OF 1859, AND PARTICULARLY IN ACT VIII OF 1859, B. C.?

TO THE EDITOR OF THE LAW OBSERVER.

SIR,—From a perusal of the decision of the Chief Justice in Itani Doorga Soondari's case (18, W. R., p. 234) it would appear, that the word "land" in Act X of 1859, must



be interpreted to bear *one and the same* meaning wherever it occurs in that Act; that in Sec. 112 et seq., "land" evidently means, land used for agricultural purposes; and that therefore "land" in clause 4, Sec. 23, (and in all other sections) must mean, land used for *such* purposes only. To proceed analogically, we find the word "land" in clause 6, Sec. 23, which, runs thus:—"All suits to recover the occupancy or possession of any *land, farm or tenure*, from which a ryot, farmer, or tenant has been illegally ejected, &c." Here on ordinary principles of construction "land" obviously means, land in the *direct* possession of *ryots* as opposed to farms or tenures in the *constructive* possession of farmers, talookdars or other *middlemen*. From the use of the word "or" it is abundantly clear, that in this clause, the word "land" does *not* include farms or tenures. It would therefore follow, on the principle laid down by the Chief Justice, that in *other* parts of Act X as well as in clause 6, "land" does *not* include the tenures of *middlemen*. Now, clause 4, Sec. 23, is the *only* clause which treats of the cognizance of suits for arrears of rent. The clause runs thus:—"All suits for arrears of rent due on account of *land*, either *kherajee* or *lakhuraj*, &c" There is no mention of *tenures* in this clause. Applying the dictum of the Chief Justice, the inference would be, that a suit for the rent of a tenure in the possession of a *middlemen*, is not cognizable under Act X. But this conclusion is absurd. I may refer to the Privy Council ruling in Baboo Dhunput Sing's case (9, W. R., p. C. 3) and to the High Court Ruling in Mathura Nath Kundu's case (15, W. R., p. 468) as distinctly laying down that suits for the rent of intermediate tenures *are* cognizable under Act X. I may also quote the provisions of Sec. 105, Act X, to shew that the Legislature itself recognizes, in unmistakable terms, the possibility of such suits being decreed under Act X. The section runs as follows:—"If the decree be for an arrear of rent due in respect of an *under tenure* which by the title-deeds or the custom of the country is *transferable* by sale, the judgment-creditor may make application for the sale of the *tenure*, &c." It cannot, therefore be denied that although the word "land" does *not* include "tenures," in clause 6, it *does* include them, in clause 4 Sec. 23. Hence this word can *not* be interpreted to bear the *same* meaning, wherever

it occurs in Act X of 1859. It is quite reasonable to hold that "land" like every other word in Act X or in any other Act, must have its *plain and ordinary* meaning attached to it, unless where the context shews the contrary or unless where it is defined by the Legislature in a *particular* sense.

But considering that the word has *not* been defined by Act X, and considering that *most* undertenures consist *mostly* of agricultural lands, it would perhaps be improper not to accept as correct the particular interpretation put upon the term, as used in Act X, by the highest legal authority in this part of India. This last remark, however, does not apply to the decision of a division bench in Muddun Mohun Biswas' case (17., W. R., p. 441) which puts the *same narrow* interpretation upon the word *land* in Act VIII of 1869, B. C., and excludes lands used for building purposes from the operation of that Act. "Land" in Act VIII of 1869, B. C., *has been* defined by the Legislature (vide Act V. of 1867, B. C.), to mean not only lands whereon buildings are erected, but houses and buildings themselves.

Section 1 Act V of 1867, B. C. (an Act for shortening the language used in Acts passed by the Lieutenant-Governor of Bengal in Council) enacts as follows:—"In all Acts passed after the commencement of this Act, and enacting nothing *expressly* to the contrary \* \* \* the word "land" shall include houses and buildings and corporeal hereditaments and tenements of any tenure, unless where there are *words* to exclude houses and buildings, or to restrict the meaning to tenements of same particular tenure."

Now, Act VIII of 1869, B. C., was passed *after* Act V of 1867 came into operation, and it contains *no express* provision, and there are *no words* in it, to restrict the meaning of the word "land" to tenements of any particular tenure. The words corporeal hereditaments and tenements in Act V of 1867 are wide enough to include all sorts of land *irrespective* of the use to which they are put. How in the teeth of Act V the meaning of the word "land" can be restricted to "land used for agricultural purposes," is perfectly incomprehensible to me. You, Mr. Editor, might throw some light on this subject.

DACCA, } Yours faithfully,  
3rd January, 1873. } O. N. M.

We reserve our comments on this letter till a future issue.—Ed., O. L.



## SCHEDULE I.

## PART III.—REGULATIONS.—(Continued.)

## BENGAL REGULATIONS.

Number and year.	Title.	Extent of repeal.
IX of 1804	A Regulation for altering the denomination of the Court of Circuit and the Provincial Court of Appeal for the Division of the Ceded Provinces for the Administration of Justice in Criminal Cases, in the Conquest Provinces in the Doonab and on the Right Bank of the River Jumna, and in the Territory ceded to the Honourable the East India Company in Bundelkund by the Pe-hwa	So much as has not been repealed.
VI of 1810	A Regulation for defining the penalties to which Zemindars and others shall be subject for neglecting to give due information of robberies and for harbouring robbers	Ditto
XVI of 1810	A Regulation to amend the existing Rules for the Appointment of Zillah and City Magistrates, to provide for the Appointment of Joint and Assistant Magistrates, and to alter the provisions in force for the Payment of a fixed Reward on the Conviction of Public Offenders	Ditto
I of 1811	A Regulation for making more adequate Provision for the punishment of person found guilty of the Offence of breaking into Houses, Tents or Boats, for subjecting to exemplary Punishment Persons receiving or purchasing Plundered or Stolen Property, and for granting licenses to Gold or Silversmiths, Printers or Copper-smiths, Iron-smiths, Pawnbrokers, retail Vendors of Brass or Copper wares, and Pykars or itinerant dealers in second-hand Articles	Ditto.
III of 1812	A Regulation for amending some of the Rules at present in force in regard to the conduct of inquiries into charges of a criminal nature, and for establishing additional provisions with a view to the more effectual apprehension of Criminals.	So much of section four as has not been repealed
VIII of 1814	A Regulation for extending the Provision contained in Clause Second, Section IV, Regulation III, 1812, to cases of Murder, Arson and Theft	So much as has not been repealed
XX of 1817	A Regulation for reducing into one Regulation, with Amendments and Modifications, the several Rules which have been passed for the Guidance of Darogahs and other Subordinate Officers of Police, for modifying the existing Rules concerning the Resistance or Evasion of Criminal Process, and for requiring further aid to the Police in certain cases from Proprietors and Farmers of Land and their Local Managers, as well as from the Mundals and other Heads of Villages.	Section thirty three, clauses one and two
<b>MADRAS REGULATIONS.</b>		
IX of 1816	A Regulation for reducing into one Regulation certain Rules which have been passed regarding the Office of the Zillah Magistrate, for modifying and defining his powers, and for transferring the Office of Zillah Magistrate from the Judge to the Collector of the Zillah.	Sections three, four and five.
II of 1827	A Regulation for constituting the Assistant Judges appointed under Regulation I, 1827, Joint Criminal Judges of the Zillahs in which they may be stationed and for defining the Extent to which the Powers of Magistrate shall be exercised by Subordinate Collectors.	So much as has not been repealed.

## SCHEDULE I.

## PART III.—REGULATIONS.—(Continued.)

Number and year.	Title.	Extent of repeal.
VIII of 1827	A Regulation for granting to Native Judges Jurisdiction in Criminal Cases.  BOMBAY REGULATIONS.	So much as has not been repealed.
XII of 1827	A Regulation for the establishment of a system of Police throughout the Zillahs subordinate to Bombay, for providing Rules for its Administration, and for defining the Duties and Powers of all Police Authorities and Servants.	Section ten, clause four, so much of section thirteen as has not been repealed, and section thirty-seven, clause three.
XIII of 1827	A Regulation for defining the Constitution of Courts of Criminal Justice, and the Functions and Proceedings thereof.	Sections one, two, three, seven, eight, nine, fourteen, and fifteen. Sections twenty-seven and twenty-eight.
III of 1830	A Regulation rescinding Regulations VIII and XII of 1828, and vesting the Criminal Judges with the Powers and Functions of Session Judges.	Sections two and six.
IV of 1830	A Regulation rescinding such Parts of Regulation XII of 1827 as vest the Criminal Judge with Police Jurisdiction of the Magistrate and his Assistant.	Section two.
VIII of 1831	A Regulation for modifying the Jurisdiction of Session Judges and Judicial Commissioners.	The whole.

## SCHEDULE II.

FORMS OF SUMMONS, WARRANTS, BONDS  
AND RECOGNIZANCES.

## A.

## FORM OF SUMMONS (Section 152).

To A. B., of

Whereas your attendance is necessary to answer to a complaint of (*state shortly the offence complained of*): You are hereby required to appear in person or by authorized agent, as the case may be, before the [Magistrate] of \_\_\_\_\_ on the \_\_\_\_\_ day of \_\_\_\_\_.

Herein fail not.

(Signature and Seal.)

Dated the \_\_\_\_\_ day of \_\_\_\_\_

## B.

## FORM OF WARRANT (Section 159).

To \_\_\_\_\_ (*name and designation of the person or persons who are to execute the warrant*).Whereas \_\_\_\_\_ of \_\_\_\_\_ is accused of the offence of (*state the offence*): You are hereby directed to apprehend the said \_\_\_\_\_ and produce him before me.

Herein fail not.

(Signature and Seal.)

This warrant may be endorsed as follows:—

If the said \_\_\_\_\_ shall give bail, himself in the sum of \_\_\_\_\_ with one surety in the sum of \_\_\_\_\_ (*or two sureties each in the sum of \_\_\_\_\_*) to appear before me on the \_\_\_\_\_ day of \_\_\_\_\_ he may be released.

(Signature)

Dated \_\_\_\_\_

C.

**FORM OF WARRANT OF COMMITMENT FOR INTERMEDIATE CUSTODY** (sections 196, 197 and 303).

To Jailer of  
Whereas of is charged with (state the offence in respect of which the prisoner is charged) and has been committed to take his trial before the Court of at

You are hereby required to receive the said into your custody and to produce him before the said Court when so required.

(Signature.)  
(Office and Powers.)

Dated

D.

**FORM OF WARRANT OF COMMITMENT** (section 303).

To Jailer of

Whereas of was convicted before me (name and official designation) of the offence of (mention the offence quoting Act and section) and was sentenced to (state the punishment fully and distinctly, mentioning its nature and extent); You are hereby required to receive the said into your custody in the said jail of together with this warrant, and there carry the afore-said sentence into execution according to law.

(Signature.)

Dated the day of

E.

**FORM OF BOND TO KEEP THE PEACE** (section 493).

Whereas I inhabitant of have been called upon to enter into a bond to keep the peace for the term of, I hereby bind myself not to commit a breach of the peace or do any act that may probably occasion a breach of the peace during the said term; and in case of my making default therein, I bind myself to forfeit to Her Majesty the sum of rupees.

(Signature.)

Dated

**FORM OF SECURITY TO BE SUBJOINED TO THE BOND OF THE PRINCIPAL.**

I hereby declare myself surety for the above-said that he shall not commit a breach of the peace or do any act that may probably occasion a breach of the peace during the said term; and in case of his making default therein, I hereby bind myself to forfeit to Her Majesty the sum of rupees.

(Signature.)

Dated

F.

**FORM OF RECOGNIZANCE TO PROSECUTE OR GIVE EVIDENCE** (sections 130 and 360).

I of do hereby bind myself to appear at in the court of at o'clock on the day of next and then and there to prosecute (or as the case may be, to prosecute and give evidence, or to give evidence) in the matter of a charge of against one A. B., and to attend at the said Court from day to day or as I may be otherwise directed by the presiding officer; and in case of my making default herein, I bind myself to forfeit to Her Majesty the sum of rupees.

(Signature.)

Dated

G.

**FORM OF BOND FOR GOOD BEHAVIOUR** (section 509).

Whereas I inhabitant of have been called to enter into a bond to be of good behaviour to Her Majesty the Queen and to all her subjects, for the term of, I hereby bind myself to be of good behaviour to Her Majesty and to all her subjects during the said term, and in case of my making default therein, I bind myself to forfeit to Her Majesty the sum of rupees.

(Signature.)

Dated

**FORM OF SECURITY TO BE SUBJOINED TO THE BOND OF THE PRINCIPAL.**

I hereby declare myself surety for the abovesaid that he shall be of

good behaviour to Her Majesty to all her subjects during the said term; and in case of his making default therein, I hereby bind myself to forfeit to Her Majesty the sum of rupees.

### SCHEDULE III.

#### CHARGES.

##### (I).—CHARGES WITH ONE HEAD.

(a.) I [name and office of Magistrate, &c.,] hereby charge you [name of accused person] as follows:—

(b.) That you, on or about the \_\_\_\_\_ day of \_\_\_\_\_ at \_\_\_\_\_, waged war against the Queen, and thereby committed an offence punishable under section 121 of the Indian Penal Code, and within the cognizance of the Court of Session.

(c.) \*And I hereby direct that you be tried by the said Court on the said charge.

[Signature and Seal of the Magistrate.]

[To be substituted for (b)]

2. That you, on or about the \_\_\_\_\_ day of \_\_\_\_\_ at \_\_\_\_\_, with the intention of inducing the Honourable A. B., Member of the Council of the Governor General of India, to refrain from exercising a lawful power as such Member, assaulted such Member, and thereby committed an offence punishable under section 124 of the Indian Penal Code, and within the cognizance of the Court of Session.

3. That you, being a public servant in the \_\_\_\_\_ Department, directly \_\_\_\_\_ accepted from [state the name] for another party [state the name] a gratification, other than legal remuneration, as a motive for forbearing to do an official act, and thereby committed an offence punishable under section 161 of the Indian Penal Code, and within the cognizance of the Court of Session.

4. That you, on or about the \_\_\_\_\_ day of \_\_\_\_\_ at \_\_\_\_\_, committed culpable homicide not amounting to murder, causing the death of \_\_\_\_\_, and thereby committed an offence punishable under section 304 of the Indian Penal Code, and within the cognizance of the Court of Session.

5. That you, on or about the \_\_\_\_\_ day of \_\_\_\_\_ at \_\_\_\_\_, abetted the commission of suicide by A. B., a person in a state of intoxication, and thereby committed an offence punishable under section 306 of the Indian Penal Code, and within the cognizance of the Court of Session.

6. That you, on or about the \_\_\_\_\_ day of \_\_\_\_\_ at \_\_\_\_\_, voluntarily caused grievous hurt to \_\_\_\_\_, and thereby committed an offence punishable under section 325 of the Indian Penal Code, and within the cognizance of the Court of Session.

7. That you, on or about the \_\_\_\_\_ day of \_\_\_\_\_ at \_\_\_\_\_, committed robbery, an offence punishable under section 392 of the Indian Penal Code, and within the cognizance of the Court of Session.

8. That you, on or about the \_\_\_\_\_ day of \_\_\_\_\_ at \_\_\_\_\_, committed dacoity, an offence punishable under section 395 of the Indian Penal Code, and within the cognizance of the Court of Session.

9. That you, on or about the \_\_\_\_\_ day of \_\_\_\_\_ at \_\_\_\_\_, did (or omitted to do, as the case may be) \_\_\_\_\_ such conduct being contrary to the provisions of Act \_\_\_\_\_ Section \_\_\_\_\_, and was known by you to be prejudicial to \_\_\_\_\_ and thereby committed an offence punishable under section 166 of the Indian Penal Code and within the cognizance of the Court of Session.

10. That you, on or about the \_\_\_\_\_ day of \_\_\_\_\_ at \_\_\_\_\_, in the course of the trial of \_\_\_\_\_ before \_\_\_\_\_ stated in evidence that “\_\_\_\_\_”

\_\_\_\_\_ which statement you either knew or believed to be false, or did not believe to be true, and thereby committed an offence punishable under section 193 of the Indian Penal Code and within the cognizance of the Court of Session.

In cases tried by Magistrates substitute “within any cognizance” for “within the cognizance of the Court of Session.” In (d) omit “by the said Court.”

## (II).—CHARGES WITH TWO OR MORE HEADS.

(a). I [name and office of Magistrate, &c.] hereby charge you [name of accused person] as follows:—

(b). *First*.—That you, on or about the day of at , knowing a coin to be counterfeit, delivered the same to another person, by name A. B., as genuine, and thereby committed an offence punishable under section 241 of the Indian Penal Code, and within the cognizance of the Court of Session.

*Secondly*.—That you, on or about the day of at , knowing a coin to be counterfeit, attempted to induce another person, by name A. B., to receive it as genuine, and thereby committed an offence punishable under section 242 of the Indian Penal Code, and within the cognizance of the Court of Session.

(c) and I hereby direct that you be tried by the said Court on the said charge.

[Signature and Seal of the Magistrate.]

For (b). *First*.—That you, on or about the day of at , committed murder by causing the death of , and thereby committed an offence punishable under section 302 of the Indian Penal Code, and within the cognizance of the Court of Session.

*Secondly*.—That you, on or about the day of at , by causing the death of , committed culpable homicide and thereby committed an offence punishable under section 304 of the Indian Penal Code, and within the cognizance of the Court of Session.

For (b). *First*.—That you, on or about the day of at , committed theft, and thereby committed an offence punishable under section 379 of the Indian Penal Code, and within the cognizance of the Court of Session.

*Secondly*.—That you, on or about the day of at , committed theft, having made preparation for causing death to a person in order to the committing of such theft, and thereby committed an offence punishable under section 382 of the Indian Penal Code, and within the cognizance of the Court of Session.

*Thirdly*.—That you, on or about the day of at , committed theft, having made preparation for causing restraint to a person in order to the effecting of your escape after the committing of such theft, and thereby committed an offence punishable under section 382 of the Indian Penal Code, and within the cognizance of the Court of Session.

*Fourthly*.—That you, on or about the day of at , committed theft, having made preparation for causing fear of hurt to a person in order to the retaining of property taken by such theft, and thereby committed an offence punishable under section 382 of the Indian Penal Code, and within the cognizance of the Court of Session.

For (b). That you, on or about the day of at , in the course of the inquiry into charges on section 193, before stated in evidence that “ and that you, on or about the day of at in the course of the trial of before

stated in evidence that “ one of which statements you either knew or believed to be false, or did not believe to be true, and thereby committed an offence punishable under section 193 of the Indian Penal Code and within the cognizance of the Court of Session.

In trials before Magistrates substitute “within my cognizance” for “within the cognizance of the Court of Session;” and omit “by the said Court.”



## SCHEDULE IV.

**EXPLANATORY NOTES.—1st.**—The entries in the 2nd and 6th columns of the schedule, headed respectively "Offences" and "Punishment under the Indian Penal Code," are not intended as definitions of the offences and punishments described in the several corresponding sections of the Indian Penal Code, or even as abstracts of those sections, but merely as references to the subject of the section, the number of which is given in the 1st column.

**2nd.**—The term "Whether bailable or not," in column 5, is to be taken in connection with the provisions of sections 388 and 389 of this Code.

**3rd.**—Offences may be tried by a Court superior to the Court specifically mentioned in column 7. For example, a Court of Session may try an offence entered in column 7 as triable by a Magistrate.

**4th.**—The words "any Magistrate," as used in column 7, shall include any Magistrate of the 1st, 2nd or 3rd class.

**5th.**—In the territories in British India to which the General Regulations of Bengal, Madras and Bombay do not extend, the powers given by this Act shall be exercised by such officers as the Local Government of those territories respectively shall appoint.

**6th.**—The last part of the schedule, headed "Offences against other Laws," shall not be taken to alter or affect any special provision contained in such laws regarding the procedure to be followed in the case of offences made punishable thereby.

**7th.**—The direction in column 4 is meant to indicate to Magistrates the manner in which the discretion vested in them by sections 148, 149 and 150 is commonly to be used, but it is not to affect the definition of summons cases and warrant cases given in section 4.

### CHAPTER V.—OF ABETMENT.

1 Section.	2 OFFENCE.	3 Whether the Police may arrest without warrant or not.	4 Whether a warrant or a summons shall ordinarily issue in the first instance.	5 Whether bailable or not.	6 Punishment under the Indian Penal Code.	7 By what Court triable.
109	Abetment of any offence, if the act abetted is committed in consequence, and where no express provision is made for its punishment.	May arrest without warrant, if arrest for the offence abetted may be made without warrant, but not otherwise.	According as a warrant or summons may issue for the offence abetted.	According as the offence abetted is bailable or not.	The same punishment as for the offence abetted.	By the Court by which the offence abetted is triable.

110	Abetment of any offence, if the person abetted does the act with a different intention from that of the abettor.	May arrest without warrant, if arrest for the offence abetted may be made without warrant but not otherwise.	According as the offence abetted is bailable or not.	According as the offence abetted is bailable or not.	According as the offence abetted is bailable or not.	By the Court by which the offence abetted is triable.
111	When one act is abetted and a different act is done, subject to the proviso.	Ditto	Ditto	Ditto	The same punishment as for the offence intended to be abetted.	Ditto.
112	When an effect is caused by the act abetted different from that intended by the abettor.	Ditto	Ditto	Ditto	The same punishment as for the offence committed.	Ditto.
113	If abettor is present when offence is committed.	Ditto	Ditto	Ditto	Ditto	Ditto.
114	Abetment of an offence punishable with death or transportation for life, if the offence be not committed in consequence of the abetment.	Ditto	Ditto	Not bailable	Imprisonment of either description for 7 years and fine.	Ditto.
115	If an act which causes harm be done in consequence of the abetment.	Ditto	Ditto	Ditto	Imprisonment of either description for 14 years and fine.	Ditto.
116	Abetment of an offence punishable with imprisonment, if the offence be not committed in consequence of the abetment.	Ditto	Ditto	According as the offence abetted is bailable or not.	Imprisonment extending to 1 part of the longest term, and of any description provided for the offence, or fine, or both.	Ditto.

## OF ABETMENT.—(Continued.)

1 Section	2 OFFENCE.	3 Whether the Police may arrest without warrant or not.	4 Whether a warrant or a summons shall ordinarily issue in the first instance.	5 Whether bail-able or not.	6 Punishment under the Indian Penal Code.	7 By what Court triable.
	If the abettor or the person abetted be a public servant, whose duty it is to prevent the offence.	May arrest without warrant, if arrest for the offence abetted may be made without warrant but not otherwise.	According as a warrant or summons may issue for the offence abetted.	According as the offence abetted is bailable or not.	Imprisonment extending to 10 years, or of the longest term, and of any description provided for the offence, or fine, or both.	By the Court by which the offence abetted is triable.
117	Abetting the commission of an offence by the public, or by more than ten persons.	Ditto	Ditto	Ditto	Imprisonment of either description for 3 years, or fine, or both.	Ditto.
118	Concealing a design to commit an offence punishable with death or transportation for life, if the offence be committed.	Ditto	Ditto	Not bailable.	Imprisonment of either description for 7 years and fine.	Ditto.
	If the offence be not committed.	Ditto	Ditto	Ditto	Imprisonment of either description for 3 years and fine.	Ditto.
119	A public servant concealing a design to commit an offence, which it is his duty to prevent, if the offence be committed.	Ditto	Ditto	According as the offence abetted is bailable or not.	Imprisonment extending to 10 years, or of the longest term, and of any description provided for the offence, or fine, or both.	Ditto.
	If the offence be punishable with death or transportation.	Ditto	Ditto	Not bailable.	Imprisonment of either description for 10 years.	Ditto.

If the offence be not committed	Ditto	Ditto	According as the offence is abetted or not.	Imprisonment extending to 1 part of the longest term, and of any description provided for the offence, or fine, or both.	Ditto.
120 Concealing a design to commit an offence punishable with imprisonment, if the offence be committed.	Ditto	Ditto	Ditto	Imprisonment extending to 1 part of the longest term, and of the description provided for the offence, or fine, or both.	Ditto.
If not committed.	Ditto	Ditto	Ditto	Imprisonment extending to 1 part of the longest term, and of the description provided for the offence, or fine, or both.	Ditto.

## CHAPTER VI.—OFFENCES AGAINST THE STATE\*

121 Waging or attempting to wage war, or abetting the waging of war against the Queen.	Shall not arrest without warrant.	Warrant	Not bailable.	Death, or transportation for life, and forfeiture of property.	Court of Session.
121A Conspiring to commit certain offences against the State.	Ditto	Ditto	Ditto	Transportation for life or any shorter term, or imprisonment of either description for ten years.	Ditto.
122 Collecting arms, &c, with the intention of waging war against the Queen.	Ditto	Ditto	Ditto	Transportation for life, or imprisonment of either description for 10 years, and forfeiture of property.	Ditto.
123 Concealing with intent to facilitate a design to wage war.	Ditto	Ditto	Ditto	Imprisonment of either description for 10 years and fine.	Ditto.

## CHAPTER VI.—OFFENCES AGAINST THE STATE—Continued.

Section.	2	3	4	5	6	7
	Offence.	Whether the Police may arrest without warrant or not	Whether a warrant or a summons shall ordinarily issue in the first instance.	Whether bail-able or not.	Punishment under the Indian Penal Code.	By what Court triable
124	Assaulting Governor-General, Governor, &c., with intent to compel or restrain the exercise of any lawful power.	Shall not arrest without warrant.	Warrant	Not bailable ...	Imprisonment of either description for 7 years and fine	Court of Sessions.
124A	Exciting, or attempting to excite, disaffection.	Ditto	Ditto	Ditto	Transportation for life or for any term and fine, or imprisonment of either description for three years and fine, or fine.	Ditto.
125	Waging war against any Asiatic power in alliance or at peace with the Queen, or abetting the waging of such war.	Ditto	Ditto	Ditto	Transportation for life and fine, or imprisonment of either description for seven years and fine, or fine.	Ditto.
126	Committing depredation on the territories of any power in alliance or at peace with the Queen	Ditto	Ditto	Ditto	Imprisonment of either description for 7 years and fine, and forfeiture of certain property.	Ditto.
127	Receiving property taken by war or depredation mentioned in sections 125 and 126.	Ditto	Ditto	Ditto	Ditto	Ditto
128	Public servant voluntarily allowing prisoner of State or War in his custody to escape.	Ditto	Ditto	Ditto	Transportation for life, or imprisonment of either description for 10 years and fine.	Ditto.

129	Public servant negligently suffering prisoner of State or War in his custody to escape.	Ditto	...	Ditto	...	Bailable	Simple imprisonment for three years and fine.	Court of Session or Magistrate of the 1st class.
130	Aiding escape of, rescuing, or harbouring such prisoner, or offering any resistance to the capture of such prisoner.	Ditto	...	Ditto	...	Not bailable	Transportation for life, or imprisonment of either description for 10 years and fine.	Court of Session.

## CHAPTER VII.—OFFENCES RELATING TO THE ARMY AND NAVY.

131	Abetting mutiny, or attempting to seduce an officer, soldier, or sailor from his allegiance or duty.	May arrest without warrant.	...	Not bailable	Transportation for life, or imprisonment of either description for 10 years and fine.	Court of Session.
132	Abetment of mutiny, if mutiny is committed in consequence thereof.	Ditto	...	Ditto	Death or transportation for life, or imprisonment of either description for 10 years and fine.	Ditto.
133	Abetment of an assault by an officer, soldier, or sailor on his superior officer when in the execution of his office.	Ditto	...	Ditto	Imprisonment of either description for three years and fine.	Court of Session or Magistrate of the 1st class.
134	Abetment of such assault, if the assault is committed.	Ditto	...	Ditto	Imprisonment of either description for seven years and fine.	Court of Session.

## CHAPTER VII.—OFFENCES RELATING TO THE ARMY AND NAVY.—Continued.

1	2	3	4	5	6	7
	OFFENCE.	Whether the Police may arrest without warrant or not.	Whether a warrant or summons shall ordinarily issue in the first instance.	Whether bailable or not.	Punishment under the Indian Penal Code.	By what Court triable.
135	Abetment of the desertion of an officer, soldier, or sailor	May arrest without warrant	Warrant	Bailable	Imprisonment of either description for two years, or fine, or both.	Magistrate of the 1st or 2nd class.
136	Harbouring such an officer, soldier, or sailor who has deserted.	Ditto	Ditto	Ditto	Ditto	Ditto.
137	Deserter concealed on board merchant vessel, through negligence of master or person in charge thereof.	Shall not arrest without warrant	Summons	Ditto	Fine of 500 rupees	Ditto.
138	Abetment of act of insubordination by an officer, soldier, or sailor, if the offence be committed in consequence.	May arrest without warrant	Warrant	Ditto	Imprisonment of either description for six months, or fine, or both:	Ditto.
140	Wearing the dress or carrying any token used by a soldier, with intent that it may be believed that he is such a soldier.	Ditto	Summons	Ditto	Imprisonment of either description for three months, or fine of 500 rupees, or both.	Any Magistrate.



## CHAPTER VIII—OFFENCES AGAINST THE PUBLIC TRANQUILITY.

	Being member of an unlawful assembly.	May arrest without warrant.	Summons	Bailable	Imprisonment of either description for six months, or fine, or both.	Any Magistrate.
143	Being member of an unlawful assembly.		..	..		
144	Joining an unlawful assembly armed with any deadly weapon.	Ditto	Warrant	Ditto	Imprisonment of either description for two years, or fine or both.	Ditto.
145	Joining or continuing in an unlawful assembly, knowing that it has been contumacious to disperse.	Ditto	Ditto	Ditto	Ditto	Ditto.
147	Rioting .. ..	Ditto	Ditto	Ditto	Ditto	Ditto.
148	Rioting armed with a deadly weapon	Ditto	Ditto	Ditto	Imprisonment of either description for 3 years, or fine, or both.	Court of Session or Magistrate of the 1st class.
149	If an offence be committed by any member of an unlawful assembly every other member of such assembly shall be guilty of the offence.	According as arrest may be made without warrant for the offence or not.	According as a warrant or summons may issue for the offence.	According to the offence is bailable or not.	The same as for the offence.	By the Court by which the offence is triable.
150	Hiring, engaging, or employing persons to take part in an unlawful assembly.	May arrest without warrant.	According to the offence committed by the person hired, engaged, or employed.	Ditto	The same as for a member of such assembly, and for any offence committed by any member of such assembly.	Ditto.
151	Knowingly joining or continuing in any assembly of five or more persons after it has been commanded to disperse.	Ditto	Summons	Bailable	Imprisonment of either description for six months, or fine, or both.	Any Magistrate.

## CHAPTER VIII.—OFFENCES AGAINST THE PUBLIC TRANQUILITY.—Continued.

1 Section.	2 OFFENCE.	3 Whether the Police may arrest without warrant or not.	4 Whether a warrant or a summons shall ordinarily issue in the first instance.	5 Whether bailable or not	6 Punishment under the Indian Penal Code.	7 By what Court triable.
152	Assaulting or obstructing public servant when suppressing riot, &c.,	May arrest without warrant.	Warrant	... Bailable	Imprisonment of either description for three years, or fine, or both.	Court of Session or Magistrate of the 1st class.
153	Wantonly giving provocation with intent to cause riot, if rioting be committed. If not committed ...	Ditto	Ditto	Ditto	Imprisonment of either description for 1 year, or fine, or both.	Any Magistrate.
154	Owner or occupier of land not giving information of riot, &c.	Ditto	Summons	Ditto	Imprisonment of either description for six months, or fine, or both.	Ditto.
155	Person for whose benefit or on whose behalf a riot takes place not using all lawful means to prevent it.	Shall not arrest without warrant.	Ditto	Ditto	Fine of 1,000 rupees	Magistrate of the 1st or 2nd class.
156	Agent of owner or occupier for whose benefit a riot is committed not using all lawful means to prevent it.	Ditto	Ditto	Ditto	Fine	Ditto.
		Ditto	Ditto	Ditto	Ditto	Ditto.

157	Harbouring persons hired for an unlawful assembly.	May arrest without warrant.	Ditto	...	Ditto	Imprisonment of either description for 6 months, or fine, or both.	Ditto.
158	Being hired to take part in an unlawful assembly or riot.	Ditto	Ditto	...	Ditto	...	Ditto.
159	Or to go armed	Ditto	Warrant	...	Ditto	Imprisonment of either description for 2 years, or fine, or both.	Ditto.
160	Committing affray	Shall not arrest without warrant.	Summons	...	Ditto	Imprisonment of either description for one month, or fine of 100 rupees, or both.	Any Magistrate.

## CHAPTER IX.—OFFENCES BY OR RELATING TO PUBLIC SERVANTS.

161	Being or expecting to be a public servant, and taking a gratification other than legal remuneration in respect of an official act.	Shall not arrest without warrant.	Summons	...	Bailable	Imprisonment of either description for 3 years, or fine, or both.	Court of Session or Magistrate of the 1st class.
162	Taking a gratification in order by corrupt or illegal means to influence a public servant.	Ditto	Ditto	...	Ditto	Ditto	Ditto.
163	Taking a gratification for the exercise of personal influence with a public servant.	Ditto	Ditto	...	Ditto	Simple imprisonment for 1 year, or fine, or both.	Magistrate of the 1st class.
164	Abetment by public servant of the offences defined in the last two preceding clauses with reference to himself	Ditto	Ditto	...	Ditto	Imprisonment of either description for 3 years, or fine, or both.	Court of Session or Magistrate of the 1st class.

## CHAPTER IX.—OFFENCES BY OR RELATING TO PUBLIC SERVANTS.—Continued.

1 Section	2 Offence.	3 Whether the Police may arrest with- out warrant or not	4 Whether a warrant or a summons shall ordinarily issue in the first instance	5 Whether bail- able or not.	6 Punishment under the Indian Penal Code.	7 By what Court triable.
165	Public servant obtaining any valuable thing, without consideration, from a person concerned in any proceeding or business transacted by such public servant.	Shall not arrest without warrant.	Summons	Bailable	Simple imprisonment for 2 years, or fine, or both.	Magistrate of the 1st or 2nd class.
166	Public servant disobeying a direction of the law with intent to cause injury to any person.	Ditto	Ditto	Ditto	Simple imprisonment for 1 year, or fine, or both.	Ditto.
167	Public servant framing an incorrect document with intent to cause injury	Ditto	Ditto	Ditto	Imprisonment of either description for 3 years, or fine, or both.	Court of Session or Magistrate of the 1st class.
168	Public servant unlawfully engaging in trade.	Ditto	Ditto	Ditto	Simple imprisonment for 1 year, or fine, or both.	Magistrate of 1st class
169	Public servant unlawfully buying or bidding for property.	Ditto	Ditto	Ditto	Simple imprisonment for 2 years, or fine or both, and confiscation of property, if purchased.	Ditto.

170	Personating a public servant	...May arrest with- out warrant.	...	Ditto	... Imprisonment of either des- cription for 2 years, or fine, or both.	Any Magis- trate.
171	Wearing garb or carrying token used by public servant with frau- dulent intent.	Ditto	... Summons	Ditto	... Imprisonment of either des- cription for 3 months, or fine of 200 rupees, or both.	Ditto.
CHAPTER X.—CONTEMPTS OF THE LAWFUL AUTHORITY OF PUBLIC SERVANTS.						
172	Absconding to avoid service of sum- mons or other proceeding from a public servant.	Shall not arrest without war- rant.	... Summons	... Ballable	... Simple imprisonment for 1 month, or fine of 500 ru- pees, or both.	Any Magis- trate.
	If summons or notice require at- tendance in person, &c., in a Court of Justice.	Ditto	Ditto	Ditto	... Simple imprisonment for 6 months, or fine of 1,000 rupees, or both.	Ditto.
173	Preventing the service or the affix- ing of any summons or notice, or the removal of it when it has been affixed, or preventing a pro- clamation.	Ditto	Ditto	Ditto	... Simple imprisonment for 1 month, or fine of 500 ru- pees, or both.	Magistrate of the 1st or 2nd class.
	If summons, &c., require attendance in person, &c., in a Court of Jus- tice.	Ditto	Ditto	Ditto	... Simple imprisonment for 6 months, or fine of 1,000 rupees, or both.	Ditto.
174	Not obeying a legal order to attend at a certain place in person or by agent, or departing therefrom without authority.	Ditto	Ditto	Ditto	... Simple imprisonment for 1 month, or fine of 500 ru- pees, or both.	Any Magis- trate.
	If the order require personal attend- ance, &c., in a Court of Justice.	Ditto	Ditto	Ditto	... Simple imprisonment for 6 months, or fine of 1,000 rupees, or both.	Ditto.

## CHAPTER X.—CONTENTS OF THE LAWFUL AUTHORITY OF PUBLIC SERVANTS.—Continued.

1 Section.	2 OFFENCE.	3 Whether the Police may arrest with- out warrant or not.	4 Whether a warrant or a summons shall ordinarily issue in the first instance.	5 Whether bail- able or not.	6 Punishment under the Indian Penal Code.	7 By what Court triable.
175	Intentionally omitting to produce a document to a public servant by a person legally bound to produce or deliver such document.	Shall not arrest without warrant.	Summons	Bailable	Simple imprisonment for 1 month, or fine of 500 rupees, or both.	Court in which the offence is committed, subject to the provisions of Chapter XXXII of this Code, or if not committed in a Court, a Magistrate of the 1st or 2nd class.
	If the document is required to be produced in or delivered to a Court of Justice.	Ditto	Ditto	Ditto	Simple imprisonment for 6 months, or fine of 1,000 rupees, or both.	Ditto.
176	Intentionally omitting to give notice or information to a public servant by a person legally bound to give such notice or information.	Ditto	Ditto	Ditto	Simple imprisonment for one month, or fine of 500 rupees, or both.	Magistrate of the 1st or 2nd class.

177	If the notice or information required respects the commission of an offence, &c. Knowingly furnishing false information to a public servant. If the information required respects the commission of an offence, &c.	Ditto	...	Ditto	...	Ditto	Simple imprisonment for 6 months, or fine of 1,000 rupees, or both.	Ditto.
178	Refusing oath when duly required to take oath by a public servant.	Ditto	...	Ditto	...	Ditto	Simple imprisonment for 6 months, or fine of 1,000 rupees, or both.	Ditto.
179	Being legally bound to state truth, and refusing to answer questions.	Ditto	...	Ditto	...	Ditto	Ditto	Ditto.
180	Refusing to sign a statement made to a public servant when legally required to do so.	Ditto	...	Ditto	...	Ditto	Simple imprisonment for 3 months, or fine of 500 rupees, or both.	Ditto.

Court in which the offence is committed, subject to the provisions of Chapter XXXII of this Code, or if not committed in a Court, a Magistrate of the 1st or 2nd class



## CHAPTER X.—CONTENTS OF THE LAWFUL AUTHORITY OF PUBLIC SERVANTS.—Continued.

1 Section.	2 OFFENCE.	3 Whether the Police may arrest without warrant or not.	4 Whether a warrant or summons shall ordinarily issue in the first instance.	5 Whether bailable or not.	6 Punishment under the Indian Penal Code.	7 By what Court triable.
181	Knowingly stating to a public servant on oath as true that which is false.	Shall not arrest without warrant.	Warrant	Bailable	Imprisonment of either description for 3 years, or fine, or both.	Court of Session or Magistrate of the 1st class.
182	Giving false information to a public servant in order to cause him to use his lawful power to the injury or annoyance of any person.	Ditto	Summons	Ditto	Imprisonment of either description for 6 months, or fine of 1,000 rupees, or both.	Magistrate of the 1st or 2nd class.
183	Resistance to the taking of property by the lawful authority of a public servant.	Ditto	Ditto	Ditto	Ditto	Ditto.
184	Obstructing sale of property offered for sale by authority of a public servant.	Ditto	Ditto	Ditto	Imprisonment of either description for 1 month, or fine of 500 rupees, or both.	Ditto.
185	Bidding, by a person under a legal incapacity to purchase it, for property at a lawfully authorized sale, or bidding without intending to perform the obligations incurred thereby.	Ditto	Ditto	Ditto	Imprisonment of either description for 1 month, or fine of 200 rupees, or both.	Ditto.
186	Obstructing public servant in discharge of his public functions.	Ditto	Ditto	Ditto	Imprisonment of either description for 3 months, or fine of 500 rupees, or both.	Ditto.

[187	Omission to assist public servant when bound by law to give such assistance.	...	Ditto	...	Ditto	Simple imprisonment for 1 month, or fine of 200 rupees, or both.	Ditto.
	Willfully neglecting to aid a public servant who demands aid in the execution of process, the prevention of offences, &c.	...	Ditto	...	Ditto	Simple imprisonment for 6 months, or fine of 500 rupees, or both.	Ditto.
188	Disobedience to an order lawfully promulgated by a public servant, if such disobedience causes obstruction or annoyance or injury to persons lawfully employed.	...	Ditto	...	Ditto	Simple imprisonment for one month, or fine of 200 rupees, or both.	Ditto.
	If such disobedience causes danger to human life, health or safety, &c.	...	Ditto	...	Ditto	Imprisonment for 6 months, or fine of 1,000 rupees, or both.	Ditto.
189	Threatening a public servant with injury to him, or one in whom he is interested, to induce him to do or forbear to do any official act.	...	Ditto	...	Ditto	Imprisonment of either description for two years, or fine, or both.	Ditto.
190	Threatening any person to induce him to refrain from making a legal application for protection from injury.	...	Ditto	...	Ditto	Imprisonment of either description for 1 year, or fine, or both.	Ditto.
CHAPTER XI.—FALSE EVIDENCE AND OFFENCES AGAINST PUBLIC JUSTICE.							
193	Giving or fabricating false evidence in a judicial proceeding.	Shall not arrest without warrant.	Warrant	...	Bailable	Imprisonment of either description for 7 years and fine.	Court of Session or Magistrate, 1st class.

## CHAPTER XI.—FALSE EVIDENCE AND OFFENCES AGAINST PUBLIC JUSTICE.—Continued.

1 Section.	2 Offence.	3 Whether the Police may arrest without warrant or not.	4 Whether a warrant or a summons shall ordinarily issue in the first instance.	5 Whether bailable or not.	6 Punishment under the Indian Penal Code.	7 By what Court triable
	Giving or fabricating false evidence in any other case.	Shall not arrest without warrant.	Warrant	Bailable	Imprisonment of either description for 3 years and fine.	Court of Session or Magistrate, 1st class.
194	Giving or fabricating false evidence with intent to cause any person to be convicted of a capital offence.	Ditto	Ditto	Not bailable...	Transportation for life, or rigorous imprisonment for 10 years and fine.	Court of Session.
	If innocent person be thereby convicted and executed.	Ditto	Ditto	Ditto	Death, or as above	Ditto.
195	Giving or fabricating false evidence, with intent to procure conviction of an offence punishable with transportation, or imprisonment for more than seven years.	Ditto	Ditto	Ditto	The same as for the offence...	Ditto.
196	Using in a judicial proceeding evidence known to be false or fabricated.	Ditto	Ditto	According as the offence of giving such evidence is bailable or not.	The same as for giving or fabricating false evidence.	Court of Session or Magistrate, 1st class.

197	Knowingly issuing or signing a false certificate relating to any fact of which such certificate is by law admissible in evidence.	Ditto	...	Ditto	...	Bailable	...	The same as for giving false evidence.	Ditto.
198	Using as a true certificate one known to be false in a material point.	Ditto	...	Ditto	...	Ditto	...	Ditto	Ditto.
199	False statement made in any declaration which is by law received as evidence.	Ditto	...	Ditto	...	Ditto	...	Ditto	Ditto.
200	Using as true any such declaration known to be false.	Ditto	...	Ditto	...	Ditto	...	Ditto	Ditto.
201	Causing disappearance of evidence of an offence committed, or giving false information touching it to screen the offender, if a capital offence.	Ditto	...	Ditto	...	Ditto	...	Imprisonment of either description for 7 years and fine.	of Court, Session.
	If punishable with transportation or imprisonment for ten years.	Ditto	...	Ditto	...	Ditto	...	Imprisonment of either description for 3 years and fine	Court of Session or Magistrate of the 1st class.
	If punishable with less than 10 years' imprisonment.	Ditto	...	Ditto	...	Ditto	...	Imprisonment for quarter of the longest term, and of the description provided for the offence, or fine, or both.	By a Magistrate of the 1st class or by the Court by which the offence is triable.
202	Intentional omission to give information of an offence by a person legally bound to inform.	Ditto	...	Summons	...	Ditto	...	Imprisonment of either description for 6 months, or fine, or both.	Magistrate of the 1st or 2nd class.

## CHAPTER XI.—FALSE EVIDENCE AND OFFENCES AGAINST PUBLIC JUSTICE—Continued.

1	2	3	4	5	6	7
Section.	OFFENCE.	Whether the Police may arrest without warrant or not.	Whether a warrant or a summons shall ordinarily issue in the first instance.	Whether bailable or not.	Punishment under the Indian Penal Code.	By what Court triable.
203	Giving false information respecting an offence committed.	Shall not arrest without warrant.	...	Bailable	Imprisonment of either description for 2 years, or fine, or both.	Magistrate of the 1st or 2nd class.
204	Secreting or destroying any document to prevent its production as evidence.	Ditto	Ditto	Ditto	Ditto	Magistrate of the 1st class.
205	False personation for the purpose of any act or proceeding in a suit or criminal prosecution, or for becoming bail or security.	Ditto	Ditto	Ditto	Imprisonment of either description for 3 years, or fine, or both.	Court or Session of Magistrate of the 1st class.
206	Fraudulent removal or concealment, &c., of property to prevent its seizure as a forfeiture, or in satisfaction of a fine under sentence, or in execution of a decree.	Ditto	Ditto	Ditto	Imprisonment of either description for 2 years, or fine, or both.	Magistrate of the 1st or 2nd class.
207	Claiming property without right, or practising deception touching any right to it, to prevent its being taken as a forfeiture, or in satisfaction of a fine under sentence, or in execution of a decree.	Ditto	Ditto	Ditto	Ditto	Ditto.

same; provided that such application be made within one year from the sale of such property, or good reason to the satisfaction of the Commissioners be shown why such application was not made. Otherwise such balance shall be held by the Commissioners, upon trust for the purposes of the said Act V of 1870.

5. In section 29 and 31 of the said Act XXII of 1855, from such time as the Lieutenant-Governor of Bengal shall notify in the *Calcutta Gazette*, for the words "fifty pounds" wherever such words occur, shall be substituted the words "five pounds," and the said Act shall be thereafter read and construed as if the words hereby directed to be substituted were inserted in place of the words for which they are hereby directed to be substituted.

Vessels not to have more than five pounds of powder, &c., on board.

6. It shall be the duty of all police officers to give immediate information to the Commissioners of any offence committed contrary to the provisions of the said Act V of 1870, or of Act XXII of 1855; or of any bye-laws or rules having the force of law prescribed in accordance therewith. Any police officer may arrest any person committing in his view any offence against any of the said provisions, if the name and address of such person be unknown. Such person may be detained at the station-house until his name and address shall be correctly ascertained.

7. This Act shall be read with and taken as part of the said Act V of 1870, and of the said Act XXII of 1855.

Construction of Act.





# CIVIL RULINGS.

## Rulings of the High Court, Bengal.

THE 16TH SEPTEMBER, 1872.

*Present :*

The Hon'ble Sir RICHARD  
COOPER, KNIGHT, ... *Chief Justice.*

The Hon'ble W. AINSLIE, ... *Judge.*

*Regular Appeals from the Decision passed by  
the Subordinate Judge of Patna, dated the  
30th of December 1870.*

CASE No. 62 OF 1871.

Baboo Nand Coomar Lall and } (*Plffs.*),  
another } *Appellants,*  
*versus*

Moulvie Ruzeeoodeen Hossein } (*Defts.*), *Res-*  
otherwise called Sahed Hos- } *pondents.*  
sein and others

CASE No. 41 OF 1872.

Baboo Nund Coomar Lall and } (*Plaintiffs*),  
another } *Appellants,*  
*versus*

Syed Ruzeeoodeen Hossein, } (*Defts.*), *Res-*  
otherwise called Shahed } *pondents.*  
Hossein

CASE No. 42 OF 1872.

Baboo Nund Coomar Lall and } (*Plaintiffs*),  
another } *Appellants,*  
*versus*

Moulvie Abdool Lutiff and } (*Def.*), *Res-*  
others } *pondents.*

*For Appellants.*—Baboo Unnoda Persad  
Banerjee.

*For Respondents.*—Mr. C. Gregory.

Under the Mitakshara a son cannot control his father's act in respect of a property, the succession to which is liable to obstruction; and it is only in respect of property not liable to obstruction, that the wealth of the father and grandfather becomes the property of his sons or grandsons by virtue of birth.

The plaintiffs in this suit are the sons of Laekram Lall and the case in the plaint was that Laekram Lall held a share in the re-

cently settled Mehal Jehangerpore Mungar-pal ancestral property, two-thirds of which share was the share of the plaintiffs, and one-third the share of their father, that in a suit brought by the plaintiffs against Laekram and others the Zillah Judge of Patna decreed the two-thirds to them, and on the 7th of May 1869, the writ for delivery of possession was issued by that Court; that subsequently, on the application of the principal defendants who had purchased the right and interest of Laekram, the Judge passed an order giving possession to the principal defendants, and the plaint prayed for possession of the two-thirds and mesne profits.

The case of the principal defendants, Huruck Lall and others, was that the property in suit was brought to a sale under a lien of a good and just debt of Mohesh Dass, and the share of the plaintiffs was sold and further that the property in suit had not descended from ancestors. The suit was heard by the Subordinate Judge of Patna with two others of the same nature, and he found that the property in this suit was purchased by Laekram as manager for himself and his sons, and was to be viewed in the light of ancestral property, but holding that the sale which was under a decree of the Court of Shahabad was valid, he dismissed the suit with costs. In his judgment he refers to the judgment in the suit which is the subject of the appeal No. 41 of 1872, and we take as part of the Judgment in this suit. In that it appeared that of the share of 2 annas 1D. 6½C. held by Laekram he directly inherited from his father or grandfather 12½ D., and the remainder he inherited collaterally from the widows of two of his brothers and of a nephew. Two questions were raised in the appeal; first, whether the sale of the plaintiff's share was justified and was binding on them; secondly, whether, if it was not, the plaintiffs were entitled to a decree in respect of the property which Laekram inherited collaterally.

The plaintiffs were not parties to the suit by Mohesh Dass under the decree in which the property was sold, and are not bound by it. It is therefore necessary for the defendants to show in this suit that the shares of the plaintiffs were liable to be sold under it. The money was lent by Mohesh Dass on three bonds, dated the 1st of December 1862, the 23rd of May 1863, and the 2nd of October 1864, and the only witness examined in this suit was the writer of two of them, who said, that Laekram told Mohesh Dass that in order to meet expenses attending on his journey to Oyah, where he was going to perform some religious ceremony he was obliged to borrow. The first bond recites that the money Rs. 1,200 was borrowed on account of his personal necessity. The second and third contain similar statements. As the Subordinate Judge in his judgment in this suit appears to have introduced facts proved in the other suits, we will see what they were. The evidence is in the suit which is the subject of the appeal No. 42. The first witness for the defendant only proved that he had lent Rs. 600 to Laekram in Aughran 1276. The second, a servant of Laekram said that Makhun Coomar lent Laekram money under several bonds; he had borrowed money with the view to pay Government dues, liquidate Goorooopersad's debt, Shuffee Khan's debt, and for meeting expenses of lawsuits. A third witness No. 5 said, that Laekram borrowed money from Khoodeep Sahoy why he could not tell, Laekram met legal expenses for conducting and defending lawsuits from his own funds and from funds borrowed; that he expended 8,000 or 9,000 Rupees on the occasion of his daughter's marriage, a daughter by his first wife; that the expenditure on the occasion of the plaintiff's marriage was small. No. 8 said Laekram borrowed several sums of money from Makhun Coomar in order to meet expenses attending the prosecution and defence of lawsuits and to pay Government dues; that he paid off Goorooopersad's debt (which had been decreed), and also Shuffee Khan's from the sums borrowed, that he borrowed Rs. 3,000 from Ishur Sahoye, which debt he paid off by borrowing money from Maulvie Abdool Lutiff or Chowdhry Wahed Ali. This witness, who was Mooktar of Laekram, said on cross-examination he did not remember what Laekram did actually with the specific sums that he borrowed of Makhun. There was no evidence how or for what purpose the debts which

were said to have been paid off with the borrowed money were contracted.

The evidence is altogether insufficient to establish a case in which a mortgage by a father of ancestral property would be binding on his sons. The judgment of the Subordinate Judge is mainly founded upon the assumption of facts of which there was no proof. It is therefore necessary to decide the 2nd question, whether the plaintiffs are entitled to a decree in respect of the property which Laekram inherited collaterally. In the Mitakshara Chapter 1, Section 1, Vol. 3, heritage is to be of two sorts, unobstructed or liable to obstruction. The wealth of the father or paternal grandfather becomes the property of his sons or of his grandsons, in right of there being his sons or grandsons, and that is an inheritance not liable to obstruction. "But property devolves on parents (or uncles) brothers, and the rest upon the demise of the owner, if there be no male issue, and thus the actual existence of a son and the survival of the owner are impediments to the succession, and on their ceasing, the property devolves on the successor in right of his being uncle or brother. This is an inheritance subject to obstruction." Verse 27 of the same section which was much relied upon in the argument for the appellant where it says: "Therefore it is a settled point that property in the paternal or ancestral estate is by birth," must be considered to refer to inheritance not liable to obstruction; what is described in Vol. 3 as becoming the property of sons or grandsons is in right of their being sons or grandsons. They do not by birth acquire a right in property to the succession to which by their father, there is an impediment and which he may never succeed to. Vol. 33 says, "In respect of the right by birth to the estate paternal or ancestral we shall mention a distinction under a subsequent text. In Section 5 Vol. 9, it is said:

So likewise the grandson has a right of prohibition if his unseparated father is making a donation or a sale of effects inherited from the grandfather; but he has no right of interference if the effects were acquired by the father. On the contrary, he must acquiesce because he is dependant. And Vol. 10, "Consequently the difference is this: although he has a right by birth in his father's and in his grandfather's property, still, since he is dependant on his father in regard to the paternal estate, and since the father

has a predominant interest as it was acquired by himself, the son must acquiesce in the father's disposal of his own acquired property; but since both have indiscriminately a right in the grandfather's estate, the son has a power of interdiction if the father be dissipating the property."

According to these texts the restriction upon the father's power of alienation only applies to the grandfather's property. Verses 8 and 11 of the same Section confirm this and so also does Vol. 5 of Section 5.

Doubts have been raised on this question by commentators and the arguments on each side are stated in Colébrooke's Dig. Vol. II. Madras Ed. p. 274, where the author is of opinion that the rule of equal dominion vested in father and son only applies where the property has regularly descended. The state of the question is very well stated in West and Babler Book 2, Introduction p. 19, "Ancestral property, as amongst descendants comprises property, transmitted in the direct male line from a common ancestor, and accretions to such property made with the aid of the inherited ancestral estate. Thus in the case of a father, head of a family-property inherited from his father or grandfather, is ancestral property, however acquired by its previous possessors. On the other hand property, inherited by him from females, brothers, or collaterals, or directly from a great great grandfather, appears to be subject to the same rules as if self-acquired. Ancestral property, in fact, may be said to be co-extensive with the objects of the *apartibandhadya*, or unobstructed inheritance. The view, here stated, agrees with that arrived at by Jagannatha, after a discussion of the contrary doctrines held by other lawyers. This discussion itself shows, however, that there is much to be said on both sides, and the question must be regarded as one still in controversy. What appears to be the result of the text of the *Metakshara* and the better opinion among commentators is supported by two decisions. In *Rayadar Nullatombi Chotti*, 3 Madras H. C. R., 455, it was held that a suit by a son against his father to compel a division of immoveable property inherited by the latter from his paternal cousin could not be maintained and in *Jowahir Singh V. Gyan Singh*, 4 Agra H. C. R. 78, it was held that a son cannot control his father's act in respect of a property the succession to which is liable to obstruction; and it is only

in respect of property not liable to obstruction, that the wealth of the father and grandfather becomes the property of his sons or grandsons by virtue of birth.

We concur in these decisions. The decree of the Court below must be reversed as to two-thirds of 12½ dams of the property in suit, and it must be decreed that the plaintiffs do recover two-thirds of 12½ dams of the property claimed in the plaint with mesne profits and costs of suit in proportion.

A similar decree will be made in the Appeal, No. 41 of 1872, between the same parties where the property in suit is the mehal under the old settlement, and in Appeal No. 42 of 1872 where the suit was against another purchaser.

Costs of the appeals to be borne by the parties in proportion.

THE 14TH NOVEMBER, 1872.

Present :

The Hon'ble Sir RICHARD } *Chief Justice.*  
COUCH, KNIGHT,  
The Hon'ble F. A. GLOVER,... *Judge.*

CASE No. 238 of 1872.

*Misc. Regular Appeal from an order passed by the Subordinate Judge of Zillah Poornia, dated the 29th July 1872.*

Roy Luchmiput Singh Ba- } *Decree-holder,*  
hadoor, ...

*versus*

Moonshee Jamhur Ally judg- } *Appellant.*  
ment-debtor, ...

*For Appellant.*—Mr. Allan, and Baboos Sreenath Dass and Rashbehary Ghose.

*For Respondent.*—Mr. C. Gregory.

It being stipulated that if within a certain interval there should be found to be a defect in the title of the judgment-debtor to the properties assigned over to the decree-holder and he should be dispossessed of the same, he shall be at liberty to realize the balance from the judgment-debtor personally or from his mortgaged and unmortgaged properties by executing the decree against him; he, the decree-holder, is entitled to revert to his original position and to execute his decree in the event of the contingency provided for in the agreement happening.

By entering into an arrangement of the kind as above set forth with the decree-holder, the judgment-debtor precludes himself from setting up the law of limitation if the event should happen upon which the decree-holder is entitled to fall back upon and execute his decree.

*Couch, C. J.*—In the agreement which the parties made, it was stipulated that, if within

the said interval, there should hereafter be found to be a defect in the title of the Respondent, the judgment-debtor, and the decree-holder should be dispossessed, then whatever was the unrealized portion of 40,390 Rupees the amount of the decree, the decree-holder should be at liberty to realize it from the judgment-debtor, personally or from his mortgaged and unmortgaged properties, by executing the decree against him. The reasonable construction of that stipulation is, that if there appeared to be a defect of title to any portion of the property, which was handed over to the decree-holder for the purpose of satisfying his decree, and he should be dispossessed of it by reason of such defect, he should be entitled to revert to his original position and to execute his decree. It is true that there is not inserted in the contract the words 'any portion' but when we consider what would be the consequence of the construction that the Subordinate Judge has put upon it, there can be no question that the reasonable construction is, that if the decree-holder lost a portion of what was handed over to him to satisfy his decree, then the transaction was to be put an end to, and he was to revert to his original right. It would be most unreasonable to say that supposing he were dispossessed of nineteen twentieths of this property, which might have happened, or of even more than that, he should only be at liberty to look to the remainder of it, or to take the curious remedy which the Subordinate Judge proposed of bringing some action for a breach of the contract. I think that the Subordinate Judge has put an improper construction upon this agreement, and that in the event which has happened, the decree-holder is entitled to execute his decree for so much as shall appear upon taking an account to be unsatisfied.

Then it is said that he cannot now execute his decree by reason of the law of limitation, that inasmuch as more than three years have elapsed since the application to execute it upon which this argument was made, his remedy is now gone. Certainly it appears to me an extraordinary proposition that a party consenting to this mode of having his decree satisfied, and doing in effect by agreement between the parties that which the Court could itself have done by appointing a manager and directing the profits to be paid over, should, when the event happened upon which it was stipulated the arrangement

should cease to have effect, find that the law of limitation had deprived him of all his rights under the decree.

The decision of the Full Bench to which we have been referred is not applicable to the present case. That decision was that the decree-holder by agreeing to receive the amount of his decree by instalments could not extend the period of limitation which the law allowed to him, and instead of counting the three years from the passing of the decree, count them from the time fixed for the payment of first instalment. But this is a different case, here what the judgment-debtor in effect does, is, he agrees that if, by reason of a defect of title and consequent dispossession the decree-holder cannot get the benefit of the agreement, the decree may then be executed in the same way as if no such arrangement had been made, excepting of course that the debtor would have the benefit of any monies that had been received by the decree-holder. It is he who waives as part of this agreement, the benefit of the law of limitation, if the event should happen; and I know of no rule of law which prevents such an arrangement as that being made: he, in fact, precludes himself from setting up the law of limitation, if the event should happen upon which the decree-holder is entitled to fall back upon and execute his decree. It would be most inequitable and contrary in fact to the intention of the parties and would prevent such arrangements being entered into, if we were to hold that now the right to execute the decree having revived, the law of limitation should be applied, and shall not be allowed to execute it.

I think that the order of the Subordinate Judge must be set aside, and the decree must now be executed the decree-holder, before any steps are taken to execute it, restoring the possession of such portion of the property as he still holds, and also accounting for what money he has received during the time he has held the property, so that the true balance now to be levied under the decree be ascertained. And the appellant must have the costs of this appeal, pleaders' fees being fixed as 5 Gold Mohurs.

*Glover, F. A., Judge.*—I am of the same opinion and for the reasons given by the Chief Justice.

THE 25TH NOVEMBER, 1872.

*Present:*

The Hon'ble L. S. JACKSON, and } Judges.  
" " W. MARKEY. ... }

CASE No. 271 OF 1871.

*Regular Appeal from the Decision passed by the Subordinate Judge of Jessore, dated the 29th August 1871.*

Taramonee Dassde, and others { Defendants,  
Appellants.

*versus*

Punchanun and another ... { Plaintiffs,  
Respondents.

*For Appellants.*—Baboos Sraenath Dass and Bangshee Dhur Sen.

*For Respondents.*—Baboos Kallymohun Dass and Doorgamohun Dass.

Suit laid at Rupees 9,729-8-1.

1. Where Plaintiffs purchased a part of a certain property leased in Ijara to which no specific portion of rent was assigned, and the lessee neither had explicit notice of the purchase nor consented to an apportionment of any specific amount of rent to the share of the talook which formed the subject of the sale, the latter would be justified in continuing to pay the rental which was agreed upon as a whole to her original lessor.

2. Where a statement is made against interest, and is supported not only by evidence but by strong probabilities, it is not for the Court to reject that statement where it is uncontroverted, and adopt a gratuitous suspicion of fraud.

3. An Appellate Court ought not to make an order contrary to the decree of the Lower Court unless it be upon an objection taken by the respondent under Sec. 348 of the Code of Civil Procedure.

The facts are fully set forth in the judgment.

*Mr. Justice L. S. Jackson.*—The plaintiffs, in this case, are Punchanun Bose and Issur-chunder Bose, who allege themselves to have purchased from Soorjocoomar Dutt, the Defendant No. 4, one-half share of a Talook, consisting of Mouzahs Bhomehlang and others. This moiety of a Talook forms a portion of certain immovable property which had been previously let in Izarah to the Defendant No. 1 Taramonee Dassde, for whom the Defendants Nos. 2 and 3, Bissessur Dutt and Chandercoomar Dutt, were sureties. The property was let in Izarah upon a lump jumma, no specific rent being attached to the several portions of the property which went to make up the whole. On acquiring this Talook by purchase, the plaintiffs, it appears, brought a suit in the Revenue Court under the provisions of Act X of 1859 against the lessee to recover from her that portion of the lump rental which they claimed as being the portion properly accruing upon the Talook so pur-

chased. The Revenue Court, it seems, on the ground amongst others that the Izarah Kuboolent did not specify the precise amount of the whole rent which was due upon the Talook in question, dismissed the suit, and the order of dismissal was finally affirmed, by the High Court on special appeal. The plaintiffs consequently brought the present suit in the Subordinate Judge's Court for a declaration of their title, and for the amount of rent which they claim from the time of their purchase down to the month of Kartick 1277 which, as I understand, is very nearly the period of determination of Izarah.

The defendant Taramonee resisted the suit on various grounds, one of which was that she was not liable to pay to the plaintiffs any rent inasmuch as she had not entered into any contract with them, and she also alleged that she had paid the whole of the rents as they became due to her lessor Soorjo Coomar Dutt. She denied that she had any notice of the purchase by the plaintiffs, and repudiated any liability to pay rent to them.

Soorja Coomar, the plaintiffs' vendor, was also made a defendant, but it is material to observe that the plaintiffs did not ask the Court for any decree against him for any amount of rent, but only made him a party in the suit in order to the final adjudication of their title by purchase in his presence. Soorjo Coomar denied altogether the allegation of sale to the plaintiffs. He alleged that they were in collusion with the lessee Taramonee and other parties, and that their suit was fraudulent. He also stated and admitted that he had received the Izarah profits from the farmer from 1269 to 1276.

The suit was heard by Baboo Gungachurn Sircar, the Subordinate Judge of Jessore. Besides other issues which are not material now, there was one in bar: "Have the plaintiffs a right to sue the Izaradars for the arrears of rent claimed in this suit." Then on facts, "Did the plaintiffs in Aughran 1270 purchase of the defendant Soorjocoomar Dutt his 8 annas share in Talook Bhomehlang, &c., and was the Izaradar Taramonee made aware of this purchase" and nextly, "Has the Izaradar (defendant) paid to Soorjocoomar the rents due by her on account of the said 8 annas of the Talook for the period

"for which the plaintiffs claim rent in the suit."

Upon these issues the Lower Court found that the plaintiffs had a right to sue the Izaradar. This the Subordinate Judge finds without entering much into the question, but he simply observes, "With respect to the Talook purchased by them, the plaintiffs stand in place of the original proprietor, Soorjocoomar Dutt, and are therefore entitled to receive from the lessee the arrears of rent due on that Talook.—The objection on the part of the lessee Taramonee that the plaintiffs have no right to receive rents from her is altogether futile, and I therefore set it aside."

Now, upon this question I am not prepared to say that we should be inclined to agree in the view taken by the Subordinate Judge. No doubt if the plaintiffs had purchased the whole tenure leased to the Izaradar and had given her notice of that purchase, she might have found it difficult to resist the claim for rent on the part of the purchasers, even if she had shewn that she had paid it to the original lessor. But that is not the case here. What the plaintiffs purchased was not the whole of the property leased to the Izaradar, but only a part of it to which no specific portion of rent was assigned, and although it is no doubt proved that the lessee did come to know as a fact the purchase made by plaintiffs, she certainly had no explicit notice of it nor was any apportionment made with her consent of any specific amount of rent to the share of Talook which formed the subject of sale to the present plaintiffs. That being so, I think, it is clear that she would be justified in continuing to pay the rental which was agreed upon as a whole to her original lessor. Not only that, but she was prevented by the decision of the Revenue Court from making the payment to any other party, for the effect of that decision was that the rent was payable not to the plaintiffs but to the original lessor. Then comes the question which, although not absolutely necessary as an answer to the plaintiffs' suit, is one which has been enquired into and which I think the Court should have enquired into, viz. whether the Izaradar, defendant, did pay to Soorjocoomar the whole amount of rent as alleged by her.

On this point, I think, the decision of the Lower Court cannot stand. Soorjocoomar in his written statement, declares himself, to

have received the whole amount. He was also summoned and examined as a witness in the case, and he declared on oath that he had received the whole of the rents and he acknowledged the receipts which the Izaradar, defendant, had produced as having been granted by him upon payment of such rents. There is really no evidence on the other side as to this point, but the Court below finding that Soorjocoomar had made on some other points statements which were unquestionably untrue, and therefore considering him not entitled to credit disbelieved his statements and came to the conclusion that they were made in collusion with the Izaradar, defendant, in order to defraud plaintiffs of their just claim. Now, in the first place, there is, though not strong, at least some corroboration of Soorjocoomar's statements by the witness Chunderoomar. He states that he traces from what he had heard that the farmers paid their rents down to the present time to Soorjocoomar. Besides, the evidence of another witness Annundchunder, who swore to the receipts, duly bears out his assertion. In addition to that, the statement of Soorjocoomar on this point is one made against his own interests, for, on the one hand, by that statement, he admitted having received a large sum of money for which he might quite possibly have to account to the purchasers, and on the other hand he by that admission debarred himself from any further proceedings to recover that sum of money from the lessee. Moreover the probabilities are all in favor of the supposition that he did receive the rent. He was the lessor; and also the person who obtained the decree in the Revenue Court notwithstanding that his title to rent was disputed on the ground of the sale to the plaintiffs. He is further admitted to have been in needy circumstances, and would have urgent need of the money. Everything therefore is in favor of the supposition that Soorjocoomar was in receipt of the rent. It does not follow that because a man has made a false statement in one point, therefore every other statement that he makes is likewise false. Where a statement is made against interest, and is supported not only by evidence but by strong probabilities, it is not for the Court to reject that statement where it is uncontroverted, and adopt a gratuitous suspicion of fraud. That being the case the defendant Izaradar having once paid the money to her lessor, and being declared liable



under a decree of Court to pay the same to him, and not having received any proper notice to pay it to any body else, I do not think she ought to be made liable to pay it over again to the purchasers from the lessor. I think therefore that the Court below was not justified in giving the plaintiffs a decree against the defendants 1, 2, and 3.

A question, indeed, occurred to my mind during the argument, whether under the circumstances of the case we should be at liberty to make a decree for the amount of these rents in favor of the plaintiffs against Soorjocoomar, he having, by his own admission, received the money which undoubtedly the plaintiffs were equitably entitled to receive. Possibly Soorjocoomar ought to be made liable to the plaintiffs, but it is quite clear that the plaintiffs did not bring this suit for the purpose of recovering the amount from Soorjocoomar, nor is that made an objection to the judgment of the Lower Court. The aim and intention of the plaintiffs were to recover the amount from the lessees and her sureties from whom, as I have already stated, the amount having been once taken ought not to be taken over again. But, in addition to that, we should not at present be in a condition to make any order contrary to the decree of the Lower Court, unless it be upon an objection taken by the respondent under section 348. The matter was suggested to the vakeel for the respondent, and he, for reasons which no doubt are sufficient and valid, did not think it fit to press the objection. We do not therefore think it necessary to go into that question.

The result, then, of our decision is, that the judgment of the Lower Court be reversed, and the plaintiffs' suit, so far as it relates to rent, claimed from Defendants 1, 2 and 3, dismissed; but under the circumstances of the case, looking to the conduct of all the parties, to the allegations which the several defendants have set up, and to the peculiar position of several defendants whose interests are not identical appearing before us through a single pleader, we direct that each party do bear his own costs in all the Courts.

*Mr. Justice Markby.*—I am of the same opinion. I fully share in the doubts expressed by my learned brother with reference to the question whether, even supposing that the rents had not been paid to the original lessor, the plaintiffs can recover in this suit the amount

of rent they claim without shewing that any specific amount of rent was with the consent of parties assigned to the share of the Talook which passed under the purchase. As far as I can discover, there was no proposition for an apportionment made either to the original lessor or to the defendants before the present suit for rent was brought, and no authority has been shewn to us by which the Court, independently of any agreement of the parties, could apportion a specific rent for a fractional share of a Talook out of a gross rental which was agreed between the parties to be the rent for the whole Talook. But under the circumstances, I think, it is not necessary to express any opinion on that point, because it is admitted that if the defendants have already paid rent to their original lessors they are discharged, and I agree in the conclusion that there is nothing which would entitle us to disbelieve the uncontradicted statement of the lessor Soorjocoomar that he had received the whole rent.

THE 3RD DECEMBER, 1872.

*Present :*

The Hon'ble DWARKA NATH }  
MITTER and the Hon'ble W. } *Judges.*  
AINSLIE ... .. }

CASE No. 221 OF 1872.

*Special Appeal from a Decision passed by the Judge of Zillah Dacca, dated 15th April 1872, affirming an order of the Moonsiff of that District, dated the 30th December 1871.*

Radhagovinda Shaha, ... (*Decree-holder*)  
*Appellant,*

*versus*

Brojendra 'Coomar Roy (*Judgment-debtor*)  
Chowdhry... .. *Respondent.*

The Court executing a decree for khas possession of land is authorized under Section 228 Act VIII of 1859 to remove any of the defendants against whom the decree was made, who may refuse to vacate the land covered by the decree and to deliver actual possession of the land to the decree-holder. It is hardly, however, within the Province of such Court to direct that any building should be pulled down.

*Mr. Justice Ainslie.*—This was a suit brought in 1863 for possession of certain lands. The quantity was not stated in the plaint, but the subject of suit was described by boundaries, as follows: On the west by the



lane called that of Nazir Mearjan; on the south by the land of Nety Shunder and the main road, on the east by Manaka Dhopee's house, and on the north by the thoroughfare used by the ryots. A decree was obtained by the plaintiff, and in execution of this decree considerable difficulties seem to have arisen. The northern and western boundaries are lands about the position of which there can be no doubt. The eastern boundary formerly occupied by the house of Manaka Dhopee has since been built upon by the defendants, and that portion of the southern boundary which consists of Nety Shunder's land cannot be traced at all, and therefore it is impossible to say to what extent his land formed any portion of the southern boundary.

In executing this decree the Moonsiff himself visited the spot and prepared a sketch of it, and it appears from his judgment and also from that of the Lower Appellate Court that it is impossible in any way now to define what was the original extent of Manaka Dhopee's land or at what distance from the western limit of the land in dispute commenced except by a reference to the Merass Pottah by virtue of which the defendant professed to hold these lands under Ausmutnissa Bebee. That Pottah shows that the Merass land bounded in the east by Manaka Dhopee's land, extended from the road on the west, for seven and twenty yards eastwards up to that boundary. It also shows that the Merass land is 12½ yards in width, north and south. But I do not find that that Pottah gave any means of identifying Nety Shunder's house. The Moonsiff, in default of any other means of determining what the eastern and southern boundaries specified in the plaint were, has used this Merass Pottah for the purpose, and the Judge in the Appellate Court has approved of his doing so, and has confirmed his order accordingly.

It has been contended by Mr. Allan that the onus of proving where the boundaries were, ought to be thrown on the defendants in consequence of the conduct which has been attributed to him in the judgment of the Lower Appellate Court. The judge says, "It is very clear that the debtor has taken every possible precaution to prevent the decree-holder from establishing the identity of the land decreed to him." It may be that the defendant has obliterated the boundaries which existed at the time of the

institution of the suit either whilst the suit was pending or subsequently to the passing of the decree; in either case the plaintiff could have prevented the confusion which has arisen in the first instance by application to the Court to get the existing state of things properly defined so as to prevent any future dispute; and in the second case, by at once executing his decree so as to take away the opportunity for making any change in the features of the land. Besides this, we cannot throw upon the defendants the burden of proving what is clearly for the plaintiff to prove,—the extent of his own claim. If this Merass Pottah be taken away out of the suit, the plaintiff really will have shown nothing whatever by which the land he claims can be identified. It is not enough that he shows certain boundaries with *prima facie* reasons for supposing them to be the boundaries of the land as originally intended in the plaint. As far as I understand he shows no defined boundaries at all. He does not point out the particular line those boundaries ought to take, and the reasons for their taking that particular line, and he himself filed this Merass Pottah to use against the defendant. The defendant has also taken objection to the use of this Merass Pottah. But seeing that it is a deed under which he himself professed to hold the land, and that that deed sets out the existence and position of Manaka Dhopee's house, we think that it can be fairly and properly used against him. The finding of the Court below is purely one of fact and is to the effect that from the angle on the north-western corner of the land in dispute formed by the intersection of two lines, the land covered by the decree extends for twenty-seven yards to the east with a width of 2½ yards north and south. The question was simply one of fact and no point of law arises in it, and we cannot interfere with that finding in special appeal.

Then there is the question whether the defendant's coach-house, which admittedly falls within the land decreed, should be removed or not. The Courts below have refused to remove it upon the ground, that is, no order in the decree provided for pulling down the coach-house and that its demolition consequently cannot be ordered in execution of the decree. The decree certainly is silent in the matter. But it is distinctly a decree for the khas possession by

the plaintiff of the land in suit, and if it be necessary for the purpose of executing this decree to remove any of the defendants against whom the decree was made, who may refuse to vacate the land covered by the decree, the Court on the application of the decree-holder is authorised under Section 228 of the Code of Civil Procedure to remove any such person and to deliver actual possession of the land to the plaintiff. In my opinion it is hardly within the province of the Court executing the decree to direct that a building should be pulled down, that is a matter for the decree-holder to consider after he has obtained possession, any opposition or resistance being removed out of the way by proceedings under Section 223, it will remain open to him to do what he thinks proper in the matter. At the same time and with the consent of Mr. Allan, pleader for the appellant, we think it is desirable that the defendants should be allowed time to remove the materials of the building and to clear the land. It is not quite certain from the map that has been prepared by the Moonsiff, whether the plot of land included within the strip 27 yards long and 12½ yards wide, will include some portion of the portico or the building erected by the defendants towards the eastern limit of that land or not. From the map, apparently, there would be some small portion of the portico included, but from the note appended to it we are inclined to think that this may not be the case. Be this as it may, this is a matter which can only be determined on the spot. If it should be found that that corner of the land in dispute which has been marked A.D by the Moonsiff in his map is covered by any building, the same order must apply to it as to the coach-house.

The order of the Court below will be so far modified that it will be declared that the decree-holder is entitled to enter into actual possession and occupation of the whole of the land covered by the decree as defined in the execution suit, and to apply to the Court if necessary to remove any person thereon who refuses to vacate the same under Section 228. But the defendant is to be allowed two months' time from this date within which if he so pleases he may vacate the land decreed and carry away the materials of any buildings thereon.

Costs of this appeal will be borne by the parties respectively.

THE 4TH DECEMBER, 1872.

Present:

The Hon'ble F. B. KEMP, and }  
" F. A. GLOVER, } Judges.

CASE No. 675 OF 1872.

*Special Appeal from a Decision passed by the Subordinate Judge of Mymensing, dated the 28th December 1871, reversing a decree of the Additional Moonsiff of Chowkee Mudagunge, dated the 31st May 1871.*

Hurish Chunder Chowdhry { (Plf) Appellant,  
versus

Ramchunder Chowdhry ... { (Def) Respondent.

For Appellant—Mr R. T. Allan and Babu Bosunt Chunder Mitter.

For Respondent—Baboo Sree Nath Dass.

1 A tenant even when he is found to hold an intermediate position and right, is amenable to section 17 of the Rent law.

2 The meaning of the section under which enhancement of rent takes place is not restricted to cases in which rent has not actually paid. The section must be taken to apply as well to enhancement of rent as of rent which ought to have been paid and which would have been paid under ordinary circumstances.

3 The fact of a Butwua having taken place would in no way prevent a co-sharer from claiming the rent of a ryot on his portion of share, notwithstanding that the original assignment of the jumma had been made on the understanding that the tenant paid such and such a rent at the time of the Butwua.

*Mr. Justice Glover*—This appeal is against the same judgment of the Subordinate Judge of Mymensing, which we have just now been considering in the Special Appeal No. 632 of 1872 preferred by the defendant. The plaintiff is the special appellant in this case, and he objects to the order of the Subordinate Judge dismissing his claim for rent on the ground that as the Subordinate Judge had found that the defendant had no Talooka rights, and that the notice served upon him was a valid and good notice, he ought to have given plaintiff a decree for the rates paid by occupant ryots as the Court of first instance had done. We think this objection is reasonable. The Subordinate Judge found the notice to be a valid notice under Section 17 Act X of 1859, and this, of course, would be equivalent to a finding that the defendant had only a right of occupancy. The Subordinate Judge also found as a fact on the evidence that the Talooka Sunnui on which the defendant relied to escape enhancement was void as having been granted by a person having no authority

to give it. This being so there seems to be no reason why the Subordinate Judge should not have accepted the finding of the Lower Court as to the rate of rent to be paid by the defendant considering him as an occupant ryot and have decided the case that way. It is contended by the other side that the Subordinate Judge was right in holding defendant not to be an occupant ryot, but one occupying some intermediate position between a Talookdar and an occupant ryot, and that although he had lost his former position in consequence of the sunnud having been found void, he fell back upon that which gave him a superior status to that of ordinary ryots, and entitled him to pay a lesser rent. The nature of this intermediate right has not been explained to us, it is a title unknown to the rent law and there is no such class of men between the tenure holders and the cultivating ryots entitled to the service of notices under Section 17. The case referred to by the Subordinate Judge of Dhunput Sing and others *versus* Gooman Sing and others, decided by the Privy Council on the 20th of December 1867 is not at all in point. The parties to that case were actual tenure-holders under a pottah, in this the defendant has no tenure and no pottah. In the case of Onia Churn Dutt and another *vs.* Uma Taroo Daboo reported in Vol. VIII, *Weekly Reporter*, page 181, it has been held, that a finding as to the character of a tenure does not in law remove a defendant from the category of ryots whose rents may be enhanced under Section 17 of Act X of 1859, so that even supposing the Subordinate Judge to be right in saying that the defendant holds an intermediate position and right and in not making him liable for the rates of rent paid by simple occupant ryots, he still would be amenable to Section 17 of the rent law. There has been a cross appeal filed by the defendant in this case, he objects in the first place that there was no relationship of landlord and tenant between him and the plaintiff, inasmuch as he had never paid him any rent, and that the provisions of Section 17 of Act X suppose that some rent must have been previously paid in order to enable the party to increase it, or in other words that no enhancement is possible unless some rent has previously been paid. Another objection is that inasmuch as in a Butwarah proceeding between the plaintiff and the other co-sharers in the estate, the jumma had been settled and fixed in relation to the

rent payable by the present defendant; no suit like the present would lie to unsettle that jumma unless the plaintiff first brought a suit to set aside the Butwarah proceedings within 12 years. With regard to the first objection, it by no means follows that because no rent has passed between two parties, the relationship of landlord and tenant cannot be established, for many tenants do not pay their rents although they ought to do so. The defendant admits that he is a tenant of the plaintiff, and is willing to pay a certain rate of rent, the assertion therefore that no relationship of landlord and tenant exists between the two is a palpable absurdity. Then, as to the objection that no enhancement can be had unless some rent has been previously paid, we have no doubt that the meaning of the section is not restricted to cases in which rent has actually been paid. This would assume that all tenants do invariably pay their rents to the landlord, and we think, that the Section must be taken to apply as well to enhancement of rent actually paid as of rent which ought to have been paid and which the tenant would have paid under ordinary circumstances. We therefore overrule this objection. The last objection that the plaintiff not having sued to set aside the Butwarah proceedings, the present suit would not lie is altogether untenable. The fact of a Butwarah having taken place would in no way prevent a co-sharer from enhancing the rent of a ryot on his particular share, notwithstanding that the original arrangement of the Jumma had been made on the understanding that the tenant paid such and such a rent at the time of the Butwarah. Every other sharerholder would have precisely the same privilege and could also enhance the rents on his particular share supposing the ryots to be liable. We think, therefore, that the judgment of the Subordinate Judge should be reversed, and the decree of the first Court restored with costs payable by the defendant respondent.

*Mr. Justice Kemp.*—I concur in reversing the judgment of the Subordinate Judge.

## Privy Council.

*Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Rajah Raj Kishen Singh vs. Ramjoy Surma Mozoomdar and others, from the High Court of Judicature at Fort William in Bengal; delivered 26th November, 1872.*

### Present:

Sir JAMES W. COLVILLE,  
Sir BARNES PEACOCK,  
Sir MONTAGUE SMITH,  
Sir ROBERT P. COLLIER.

### Sir LAWRENCE PEEL.

There is no principle or authority for holding that in point of law a manner of descent of an ordinary estate depending solely on family usage may not be discontinued, so as to let in the ordinary law of succession.

It is of the essence of family usages that they should be certain, invariable and continuous, and well established discontinuance must be held to destroy them, even when the discontinuance has arisen from accidental causes, and the effect cannot be lost when it has been intentionally brought about by the concurrent will of the family.

This suit was originally brought by Rajah Frankishen Singh against Hurrosoondroo Daboo, widow of one of his brothers, Gopeenath Singh, and some purchasers from her, to recover possession, "by right of family custom," of one-third of 14 annas of Pergunnah Soosing.

Rajah Frankishen died during the progress of the suit, and the present Appellant is his eldest son. Hurrosoondree is also dead; the respondents, Buroda Debia and Pranoda Debia, are daughters of Gopeenath and Hurrosoondree; the respondent Gour Kishore Lahoree is their grandson, being a son of Buroda Debia.

The plaint states that "according to family custom prevalent in the raj or estate, the right of the plaintiff, as proprietor, accrued to the estate since the death of his father, Rajah Bishonath Singh."

The claim is rested entirely on the ground of family custom, under which it is alleged that the estate was descendible on the eldest son, to the exclusion of the other sons.

It appears that the entire 18 annas of the Pergunnah were at one time enjoyed by the ancestors of the family, but 2 annas were afterwards alienated, and it appears to be assumed on both sides that these 2 annas

were a long time ago given as dower on the marriage of a daughter of one of the possessors.

Rajah Raj Singh, the grandfather of the plaintiff Frankishen, died in 1822, leaving three sons, Bisonath (the father of the plaintiff Frankishen,) Gopeenath, and Jug-gernath; and it is undisputed that on his death the three sons presented a joint petition to the Collector, describing themselves as the heirs of their father, and proprietors of the Pergunnah, and praying to be registered; and that they were so registered for the 14 annas.

Gopeenath held the one-third of the estate until his death; his widow Hurrosoondree, succeeded to the possession, and when the present suit was commenced against her in 1861, Gopeenath, and she as his widow, had been in possession for nearly forty years, viz, from 1822 to 1861.

The Appellant contends not only that the estate is descendible on a single heir male, but also that it is impartible and inalienable.

The High Court came to the conclusion that the plaintiff had failed to establish by evidence the exceptional family custom on which he relied, and reversed the contrary decision of the Principal Sudder Ameen.

The two main questions argued at the bar were—1st. Whether the family custom had been proved? and, 2nd, if so, what was the effect upon it of the acts and conduct of the family on Rajah Singh's death in 1822, and subsequently?

There is, undoubtedly, evidence which leads reasonably to the belief that, formerly, the estate was held, from time to time, by individual male members of the family; but the evidence leaves in obscurity the character and nature of the estate, and the tenure by which it was held under Mahometan rule. Some firmans and other documents, filed in a former suit, and which were sought to be made evidence in the present to show the early title, are referred to by the Principal Sudder Ameen and the High Court in the following manner.

The Principal Sudder Ameen says:—

"It appears by a decision of the Sudder Court of the 12th May, 1856, filed by the answering defendants, that the Zemindaree above-named was formerly acquired as a jagher by Rajah Ramjibon, by a firmam of

the year 1650 A.D., granted by the Emperor Shah Jehan, and at his death that jagher was conferred upon his son Rajah Ram Singh by a firman of the year 1680, granted by the Emperor Shah Alum Ghir; and after his death it was conferred as a jagher upon Rajah Kishore Singh, son of Rajah Run Singh, by a firman of the year 1749, granted by the Emperor Ahmed Shah."

The High Court, referring to these documents, say:—

"It may be admitted, as held by the Judges who disposed of the case on the 12th May, 1856, that there is something peculiar in this property. It is not improbable that it was, as alleged by the plaintiff, a jagher for military services, and as such held by one of the members of the family, usually the eldest son or brother, and that women were excluded from the succession, as being incapable of performing the duties required from the jagherdar. This succession, however, was not regulated by any family custom, but by the will of the sovereign power, and on referring to the Judgment of 1856, we find mention made of three firmans from the Mahomedan Government, only one of which is forthcoming in the present case, which prove that the property was held as a military fief, and that the holder succeeded not by right of primogeniture, but by the will of the sovereign."

And again:—

"The copies of the firman, bearing date 29th Shaban (1st Juloss), of Ahmed Shah, and of the hibanamah from Ram Singh to Run Singh, cannot be looked at, no reason having been assigned for the absence of the originals, which are said to have been filed on a former occasion. The grant of Kishore Singh to Raj Singh, dated 25 Maugh, 1169, is clearly an untrustworthy document, and has only seen the light for the first time since this case was remanded; and even if genuine it proves nothing, so we are thrown back upon one single document, bearing date the 22nd year of the reign of Mohamed Shah, which is denounced by the opposite party to be a forgery. This document purports to be a firman from the Emperor Mohamed Shah to Run Singh, confirming the jagher of Soosung to him, and requiring him to keep up a certain body of troops, consisting of cavalry and infantry. Admitting, for the moment, that this document is genuine, it really proves nothing in support of plain-

tiff's allegation. It does not prove the property to be raj, for no such name is used. It is termed a jagher, a tenure to be held as compensation for military service, and which might be transferred, at the will of the ruling power, to any other person on the same or different terms. The grantee, also, is not styled or in anywise recognized as a Rajah, but simply as a Zemindar, so that this document establishes nothing which the plaintiff seeks to prove. But, looking at the document, we have little doubt that it never came out of the royal office, either at Delhi or elsewhere. It is written on common paper, and stamped with an oval seal, which could be prepared in any bazar of India, and nothing is shown by which we might test the genuineness of the seal."

Their Lordships find great difficulty, upon these judgments pronounced by Judges who had greater opportunities than they possess of testing the genuineness of the documents, in drawing any safe conclusion from them; and the learned counsel for the Appellant felt the same difficulty, and did not press them, contending they were not material to his case.

If these documents could at all be relied on, their Lordships agree with the High Court in thinking that they point to the conclusion that the estate was held under the Mahometan rulers as a military jagher on the tenure of military service, by virtue of grants made from time to time to individual members of the family, and was not strictly an inheritable estate. If, on the other hand, reliance cannot be placed on these documents, then it is left altogether in doubt what was the original character of the estate, and the nature and conditions of its tenure.

Although much of what appears in the record, including the elaborate pedigree, must be rejected, there is still evidence that the manner of succession, relied on by the Appellant however originating, did, in fact, prevail for sometime in the family.

On the death of Rajah Kishore Singh in 1784, a perwannah was issued to his younger brother, Rajah Raj Singh, by the East India Company, who then held the grant of the Dewanny. It was addressed to him as "Zemindar of 14 annas share of Pergunnah Soosung," and states the death of the late Rajah; and goes on thus: "The Zemindary of Kismut, 14 annas of Pergunnah Soosung, which were fixed on your brother,

has, according to custom, been confirmed to you."

It thus appears that Rajah Kishore Singh had a living brother, and this perwannah was properly relied on as affording evidence that the deceased Rajah Kishore Singh had, notwithstanding, held the Zemindary as sole possessor. Rajah Kishore had no sons, but left a widow, and the fact that she did not succeed to the Zemindary, and that his brother Rajah Raj Singh was confirmed in it on his death, also points to the conclusion that the custom was supposed to prevail at the time of Rajah Raj Singh's accession in 1784.

Rajah Raj Singh continued to hold the Zemindary until his death in 1822. He was recognised as Zemindar by the British Government at the time of the Perpetual Settlement, and the settlement of the 14 annas share of Pergunnah Sooung then was made with him at the old *Pe-hku-h* (tribute), and not on a newly calculated jumma. It should however, be observed that it appears from the accounts of the Collectorate that the other 2 anna shares, formerly severed and alienated, were settled with the Zemindars who owned them, precisely in the same manner.

In the present case the estate was held directly from the Government, there being no intermediate lord. And it appears to their Lordships that, upon this settlement, any incidents of the old tenure, as a military jagheer, requiring the render of services, if any such ever existed, were as conditions of tenure, implicitly, at an end; and that the Zemindary, so far as relates to tenure, was thenceforth held under the Government as an ordinary Zemindary free from any such conditions.

The settlement would not, however, of itself, have operated to destroy a family usage regulating the manner of descent. It would not have had this effect in the case of a well established Raj (see *Babeo Beer Pertab Sahoe v. Maharajah Rajender Pertab Sahoe*, 12 Moore, I. A., 1), and even in the case where the origin could not be shown, it may be assumed that it would not, of itself, affect an existing family custom.

Regulation XI, 1793, was passed soon after this settlement. That Regulation has been held not to be applicable to the succession of a well-established Raj, (See 12 Moore, 1, and 6 Moore, 161-7). But the Respondents contend that, notwithstanding

the qualification placed upon it by Regulation X, 1800, it does govern a case like the present, where the claim rests only on a continuing family usage, and not on the peculiar character of the Zemindary itself or on a local or district custom (see *Rajah Deedar Ho-sein v. Ranees Tuhooroon Nissa*, 2 Moore, I. A., 441).

Their Lordships do not think it necessary to give any opinion on the positive effect of Regulation XI, 1793; for they think that, in the present case, there is sufficient ground for the presumption that, after the settlement and this regulation, the family were induced to regard the former state of things, and the ancient tenures, whatever they were, as at an end, and to consider and treat the property as an ordinary estate held under the British Government; and their acts show that, in fact, they did so consider and treat it.

Their Lordships propose to refer to the most important of these acts. It has been already stated that, upon the death of Rajah Raj Singh in 1822, his eldest son Bishonath, and his two younger brothers, Gopeenath and Juggernath, presented a joint petition to the Collector. It was a public act, and the document is distinct and unequivocal in its terms. The three Petitioners, who are each described as Rajah, and sons of Rajah Raj Singh, state that the Raj of 14 anna shares of Pergunnah Sooung was recorded in *Sorishta* in their father's name, and that he being dead, "they are the heirs and proprietors" of the property, and they pray to be so registered, and were registered accordingly as joint proprietors.

It is plain that this was not a merely nominal Petition; for there is clear evidence that the three brothers took and enjoyed in equal shares the profits of the estate. The three brothers also agreed by a document, in which they are described as "in possession and proprietors," to pay the Government revenue of 17,240 rupees.

In 1829 Juggernath died, and thereupon his widow, Ranees Indromonee, was registered as joint owner with Rajahs Bishonath and Gopeenath.

In April 1832, Rajahs Bishonath and Gopeenath, and the Ranees Indromonee, presented a joint petition praying for time to pay the amount of a Decree obtained against them. The petition describes them as "Zemindars of the Pergunnah."



Afterwards, Rajah Gopeenath died, and his widow, Ranees Hurrosoondree, was also registered as owner for his share.

In 1839, and again in 1841, suits were brought against tenants by, the Rajah and the two Ranees for rents due, and in 1842 a joint suit was instituted by the three for possession of part of the estate.

The transactions above enumerated show a series of important acts in dealing with the estate as joint family property, extending over a period of twenty years, all founded upon the footing that the ordinary rules of succession governed the descent.

It is now necessary to advert to some subsequent litigation.

It is alleged that, in 1843, Hurrosoondree and a son she had adopted, brought a suit against Rajah Bishonath and Indromonce for a partition of the Zemindary, in which the Rajah set up as a defence that the Raj was impartible, and descended on the eldest male heir. It is said that this defence was successful. But the proceedings in this suit were not satisfactorily proved, and the attempt to rely on it as an estoppel failed.

Other litigation followed, raising the same question, but with a different result.

Indromonce, the widow of Juggernath, died, leaving an alleged adopted son, whose guardian claimed the possession for him. This was opposed by Bishonath on the ground of the family custom, but, in the end, possession was awarded to the guardian. In 1847 Bishonath commenced a regular suit to obtain the one-third share of Juggernath, on the ground that the alleged adoption was invalid; and also again setting up the family custom of primogeniture. In this suit, which went on appeal to the High Court, a full Bench decided against the existence of the custom.

Rajah Bishonath died in August, 1853. After his death, his son, Rajah Prankishen (the Plaintiff in the present suit,) did not prosecute an Appeal to Her Majesty in Council, which had been commenced against the above decision of the High Court, but brought another suit against the guardian of this adopted son of his uncle Juggernath on the ground that the adoption was not *bonâ fide*, and claimed one-third of the estate as heir to his uncle. This suit is founded on the assumption that the custom had been negatived in the former one, for Prankishen now claimed, not on the footing of the custom, but as heir to his uncle, according to the

ordinary rule of succession, and upon the ground that the adoption was not *bonâ fide*, he succeeded in the suit.

Various considerations were put forward by the learned Counsel for the Appellants to destroy or diminish the effect of the facts which have just been adverted to. It was suggested that Bishonath may have allowed his brothers to take, each, one-third share for maintenance, but their Lordships are of opinion that the evidence points very clearly to the conclusion that the brothers were admitted to the possession as co-heirs and co-sharers, not on sufferance merely, but as of right. The learned Solicitor-General, indeed, admitted that the act of Bishonath amounted virtually to a grant to his brothers of one-third shares during their lives, but he denied that they amounted to more. In their Lordships' view, however, Bishonath, admitted his brothers to the succession, intending them to have full, complete, and equal ownership of the estate with himself.

It was then contended, for the Appellant, that if this were so, it was an attempt to do what the Hindoo Law would not allow.

It has already been stated that the acts of Bishonath and his brothers, on his father's death, afford strong ground for the belief that they did not regard the manner of succession, if it ever prevailed, in the light of a family custom, but as an incident or condition of tenure which had been determined by the settlement, and consequently assumed that thenceforth the succession would conform to the ordinary law. Their conduct, indeed, goes far to disprove that a family custom, properly so called, ever existed; but assuming it to have once existed, their Lordships think it was of a nature which could, without any violation of law, be put an end to, and that it was, in fact, discontinued.

It was urged that this could not be done without the consent of the sovereign power, viz., the British Government. There is no question, in the present case, of the maintenance of a raj or principality, or of a tenure differing in its general qualities from an ordinary estate under the British Government. Their Lordships are certainly not prepared to hold that descent on single male heirs was, after the settlement, a condition of the tenure on which this estate was held, requiring the assent of the sovereign power to a change in the manner of succession, and giving to the Government the right to resume the estate upon its violation. Their



# CRIMINAL RULINGS.

## High Court of Judicature at Fort William in Bengal.

THE 9TH SEPTEMBER 1872.

*Present :*

The Hon'ble SIR RICHARD COUCH, *Kt.*,  
Chief Justice, and the Hon'ble H. V. BAY-  
LEY, F. B. KEMP, DWARKANATH MITTER,  
and W. AINSLIE, Judges.

*Jurisdiction—Breach of the Peace—Riot—  
Haut—Act XXV of 1861, s. 62.*

*Reference to the High Court under Section  
434 of the Code of Criminal Procedure by  
Mr. C. B. Garrett, Officiating Sessions  
Judge of Dacca, dated the 15th July  
1872.*

Bykuntam Shaha Roy and others,

*versus*

Meajan.

*The Advocate-General and Baboos Mohinee  
Mohun Roy and Doorga Mohun Dass, in  
support of the reference by the Judge.*

*Mr. Woodroffe and Baboo Romesh Chunder  
Mitter, in support of the Magistrate's  
order.*

A Magistrate or other officer exercising the powers of a Magistrate is legally competent under section 62 Act XXV of 1861, to issue an order prohibiting a landholder from holding a *haut* on any particular spot on his estate on particular days, on the ground that such an order is likely to prevent a riot or an affray.

THIS case was referred to a Full Bench by Kemp and Glover, J. J., with the following remarks :—

*Kemp, J.*—The question before us is whether a Magistrate or other officer exercising the powers of a Magistrate can legally issue an order, under Section 62 of the Code of Criminal Procedure, prohibiting a landholder from holding a *haut* on any particular spot on his estate on particular days, on the ground that such order is likely to prevent a riot or affray.

There are conflicting judgments on this point. We refer to the 4th Vol., Weekly Reporter, page 12, Criminal Rulings, Seeb Chunder Bhuttacharjee *vs* Sadut Ali Khan and others; and the 11th Vol., Weekly Reporter, page 5, Criminal Rulings, case of Kalika Pershad and others.

We therefore refer the case to the Full Bench for decision. The question we would submit to the Bench is—

Whether a Magistrate or other officer exercising the powers of a Magistrate is legally competent to issue an order, under Section 62 Act XXV of 1861, prohibiting a landholder from holding a *haut* on any particular spot on his estate on particular days, on the ground that such order is likely to prevent a riot or affray, or because a riot or affray has already occurred.

The case came on for argument before the Full Bench on the 22nd August 1872.

The Court took time to consider.

*The judgment of the Court was delivered as follows on the 9th of September by*

*Couch, C J.*—The question referred to the Full Bench is “whether a Magistrate or other officer exercising the powers of a Magistrate is legally competent under Section 62 Act XXV of 1861 to issue an order prohibiting a landholder from holding a *haut* on any particular spot in his estate, on particular days, on the ground that such order is likely to prevent a riot or an affray.”

We are of opinion that this question ought to be answered in the affirmative. Section 62 of Act XXV of 1861 runs as follows:—“It shall be lawful for any Magistrate, by a written order, to direct any person to abstain from a certain act, or to take certain order with property in his possession or under his management whenever such Magistrate shall consider that such direction is likely to prevent or tends to prevent a riot or an affray.” The above provisions clearly show that it is lawful for a Magistrate to issue a written order to any person directing him to abstain from any particular act,

or to hold any property in his possession or under his management subject to any particular condition, if such Magistrate shall be satisfied that such direction is likely to prevent a riot or an affray. The word *certain* placed before the word *at*, and afterwards repeated twice in the expression "to take certain order with certain property in his possession," leaves no reasonable doubt in our minds that the Legislature intended to give full and ample powers to the Magistrate, the chief officer entrusted with the duty of preserving the peace of the district, to restrain any person from doing any act, or to command him to hold any property in his possession subject to any condition, whenever such Magistrate shall consider that such a course of procedure is likely to prevent, or even tends to prevent, a riot or an affray. No doubt the powers conferred upon the Magistrate by the Section or like all other powers of discretion created by law, to be exercised in a reasonable manner and it may further be admitted that the Magistrate is bound, before he issues the order, to satisfy himself upon reasonable grounds that that order is likely to prevent, or tends to prevent, a riot or an affray. But if a Magistrate, after exercising the reasonable discretion issues an order directing a particular landholder not to hold a *hant* on a particular spot on a particular day upon the ground that the holding of the *hant* at that particular place and time by that particular individual is likely to lead to a serious breach of the peace, we cannot upon a proper construction of Section 62 say that the order is null and void for want of jurisdiction or power. The law gives a very wide discretion to the Magistrate in matters affecting the public tranquility and it is not for us to curtail that discretion by construing the Act in a manner contrary to the plain and obvious meaning of the words in which it is expressed.

It has been argued that the powers vested in the Magistrate by Section 62 must be confined to those acts and modes of enjoyment of property only which are in themselves unlawful, and that as there is nothing inherently illegal in a man holding a *hant* on his own land on any particular day he chooses, the order passed by the Magistrate in this case must be set aside as void for want of power. But not only is this restricted construction not supported by the actual words of the Section, but its adoption might

in many cases lead to the most dangerous consequences. A particular act or a particular mode of enjoyment of property might be perfectly innocent and lawful in itself. But the act may be done, or the property enjoyed in that particular mode, under circumstances calculated to lead to a serious breach of the peace, attended even with loss of human life and it would be by no means proper or desirable to hold that even in such case, the chief Police Officer of the district has no power to issue an order such as that contemplated by Section 62. Whether a *zemindar* in all cases entitled to establish a *hant* on his own land, but in close proximity to a previously established *hant* belonging to another *zemindar*, is a question upon which we need not express any opinion. Nor is it necessary for us to determine the question whether the Magistrate has in this particular case exercised his discretion in a proper manner, or whether his order as it stands requires any amendment either as to the duration of the injunction or otherwise. For the questions have not been referred to us by the Division Bench. Assuming however, that there is nothing unlawful in a *zemindar* holding a *hant* on his own land on any day he chooses and assuming also that the mere fact of his holding a *hant* on such a spot and on such a day would not be sufficient to warrant a Magistrate in coming to the conclusion that a breach of the peace is likely to take place, it seems to us clear that there may be other circumstances connected with the holding of the *hant* at that particular place and time which would fully justify a Magistrate in issuing an order under Section 62, at least for a limited period of time, if the Magistrate is satisfied, after a reasonable exercise of the discretion vested in him by that Section, that such an order is necessary for the preservation of the public peace.

It is stated in one of the cases mentioned in the order of reference, that a Magistrate has no power under Section 62 to issue an order that would interfere with any one's right to enjoy his own property in any lawful manner he pleases. Whether a Magistrate can, under that Section, issue such an order as would be utterly destructive of a man's right of property, is not a question which we are called upon in this case to determine one way or the other. It is sufficient for us for the purposes of this reference to say that it is quite within the power

OCTOBER 1872.

V. H. SCHALCH, Esq.

*Addition to Clause 18, Section I, page 35  
of Rules.*

No. 1.

THE following addition is made to clause 18, Section I, page 35 of the Board's Rules—

"The Government Pleader should furnish every pleader appointed under this rule with a vakalatnamah."

*Circulates Government orders regarding Officers under Court of Wards not being Government Servants, &c.*

No. 2.

THE following orders are published for communication to establishments employed under the Court of Wards—

"The Lieutenant-Governor has been pleased to decide that officers under the Court of Wards are not to be considered as Government servants, unless they are Government officers lent to Wards Estates.

"His Honor, however, observes that in fit cases men, who have long and well served Courts of Wards, may be admitted to the examination of candidates for Civil appointments by special permission, under Clause (c), Rule 3 of the Native Civil, Service Examination Rules."

*Circulates Government Instructions regarding counterfeit Coins.*

No. 3.

WITH reference to Clause 1b, Chapter II, Section XII, at page 32 of the Board's Rules, the attention of Treasury Officers is drawn to the accompanying Circular No. 2068, dated the 26th August last, issued by the Government of India, in the Financial Department. The instructions therein contained should be carefully attended to.

CIRCULAR No. 2068.

GOVERNMENT OF INDIA, FINANCIAL  
DEPARTMENT,

MINT AND CURRENCY.

TO THE SECY TO THE GOVT. OF BENGAL.

*Simla, the 26th August 1872.*

SIR,

In forwarding to you a copy of the papers noted in the margin, I am directed to request that, with the permission of His Honor the Lieutenant-Governor, you will be good enough to arrange for counterfeit coins being sent to the Calcutta Mint whenever it can be done with the consent of the tenderers.

I have, &amp;c.,

(Sd.) D. BARBOUR,

*Offg. Under-Secy. to the Govt. of India.*

*Substitutes new Rule for second Clause, Rule 16, Section I, regarding the Annual Budget.*

No. 4.

THE following has been substituted for the second Clause of Rule 16, Section I, page 341, Board's Rules:—

An annual Budget, in the form of Table VI, Return No. 31, headings II. XVI, based on the actual expenditure of previous years, with a separate Statement of Ways and Means in the form prescribed below, will be prepared and submitted for the sanction of the Commissioner—

*Statement of Ways and Means to  
accompany Budgets.*

1. Estimated balance in hand on 1st April 18 .
  2. Add Estimated Receipts as in Budget.
  3. Deduct Estimated Expenditure as in Budget.
  4. Probable Balance on 1st April 18 .
- Items entered in this Budget will belong to one of these three classes.

## A. MONEY, Esq., C.B.

*States the Changes which have been made in the selling Price of abkarry Opium from 1st January 1873.*

## No. 5.

The following changes have been made, under the sanction of Government, in the selling price of abkarry opium, with effect from the 1st of January 1873—

		<i>Selling price per Ser.</i>	
<i>Division.</i>	<i>District.</i>	<i>Present.</i>	<i>Sanctioned.</i>
		<i>Rs.</i>	<i>Rs.</i>
1. Orissa ...	Balasore ...	22	25
2. Burdwan ...	All districts	22	24
3. Presidency ...			
4. Rajshahye ...			
5. Chittagong ...			
6. Orissa ...	Cuttack and Pooree	22	23
7. Dacca ...	All districts		
8. Assam ...	districts		
9. Cooch Behar	Julporee		
10. Bhagalpore	Purneh	20	22

2. The selling price in the remaining districts will remain as at present.

*Cautions.—Officers to be careful of adhesive Court Fees Stamps.*

## No. 6.

In a case recently reported to the Member in charge, a large number of Adhesive Court Fees Stamps are said to have been rendered quite unfit for use through careless exposure to damp; the sheets of Stamps becoming firmly fixed together by the gum on the back.

2. To prevent similar loss in future, all District Officers are enjoined to take extra precautions to preserve the Adhesive Stamps supplied to them from damp. The present stocks should be carefully examined, and dried when necessary, and the place where they are stored should be always kept properly dry. The sheets also, as far as possible, should be kept face to face, and never back to back.

clerk  
but

*Prohibits re-employment of a late Income-tax Clerk.*

## No. 7.

GUNGA NARAIN BANERJEE, late income-tax clerk at Jehanabad, in the district of Hooghly, has absconded to avoid his trial under a charge of fraud, and general notice is therefore given that he may not be elsewhere re-employed in any capacity under Government.

*Directs Sub-Divisional Officers to manage the Excise in accordance with Government Orders cited.*

## No. 8.

AGREEABLY to the orders of Government, the Member in charge directs that, in all districts where the sub-Divisional system has been introduced, the Officers in charge of Sub-Divisions shall, in future, manage the Excise within their jurisdiction in accordance with the following instructions embodied in para. 5 of Board's letter to Government, No. 39 of 27th January 1863, a copy of which was circulated with Board's Circular No. 13, dated 16th March 1863.

2. The system here prescribed is already followed in some districts, as regards other districts where it will now be introduced, the Commissioners concerned are requested to report to this office the date from which it comes into effect.

"I would make the Darogahs and their establishments subordinate to the Sub-Divisional Officer, who should be as strictly responsible for the administration of this portion of the duties of his Sub-Division as for every other. But I would not multiply work and burden the Sub-Divisional Establishment by making the Sub-Divisional Officer's records distinct from the Abkarry Darogah's. The Darogah should not send up to the Sub-Divisional Officer statements and reports to be recorded there, and a copy made for transmission to the Sudder Office. The Abkarry Darogah's office and records should be the office and records of the Sub-Divisional Officer. Applications, reports, and orders should pass between the Sub-Divisional Officer and the Abkarry Darogah just as they do between

"the Sub-Divisional Officer and his Sheristadar or Nazir. Statements drawn up by the Abkarry Darogah should be examined, corrected, passed, and submitted to the Sudder Office by the Sub-Divisional Officer just as if they had been drawn up by his Sheristadar, and the record of all this should be in the Abkarry Cutcherry only. This plan would obviate any complaints of additional work thrown on the Sub-Divisional Establishment.

"The Deputy Collector at the Sudder Station in charge of the Abkarry Department and income-tax, should receive all returns and statements direct from the Sub-Divisional Office; they should be compiled and aggregated in his office, and he should be responsible for pointing out to the Collector any irregularity, slackness, or objectional practice in the Sub-Divisions: he would be the Officer whom the Collector should consult in all general questions affecting the whole District. But the Sudder Deputy Collector's authority to issue instructions direct to the Sub-Divisional Officers should be confined to matters connected with the drawing up of Statements. He should also have the power of calling for information on any point, as he would be answerable for the consistent working of details all over the Districts. All general arrangements which the Sudder Station Deputy Collector might resolve to introduce would, if approved, be communicated to Sub-Divisional Officers through the Collector."

NOVEMBER 1872.

V. H. SCHALCH, Esq.

*Cancels Clause 16, Section 3 of Rules regarding periodical transfer of Ministerial Officers.*

No. 1.

CLAUSE 16, Section 3, page 175 of the Board's Rules, is cancelled, periodical transfers of ministerial officers having been discontinued.

*Alterations in Clause 12, page 42 of Board's Rules.*

No. 2.

THE following alterations should be made in Clause 12, page 42 of the Board's Rules—

After the word "Government," in line 2, add "or to the Court of Wards"; for the words "the Government," in line 6, substitute "such", after the word "Government," in line 16, add "or the Court of Wards"; and after the word "Statement," in the 20th line, add "in two parts, one including Government, and one Wards' cases."

*Requires insertion in Return No. XX of dates on which Fines under Act XX of 1848 are levied.*

No. 3.

THE Member in charge has noticed that the dates on which fines under Act XX of 1848 are levied are frequently omitted from Return No. XX, column 10. District Officers are requested to be careful to avoid such omissions in future.

A. MONEY, Esq., C.B.

*Issues instructions regarding Assessment of Income tax under Act VIII of 1872.*

No. 4.

UNDER the orders of Government, the following instructions are issued for the guidance of officers engaged in assessments of income-tax under Act VIII of 1872:—

In calculating the net profits of Joint Stock Companies under Section 10 of the Indian Income-tax Act, VIII of 1872, an abatement may be allowed on account of taxes, local rates, and cesses paid by such Companies.

No abatement, however, should be allowed on account of any income-tax previously paid by any such companies.

*Addition to Circular Order No. 1 of November 1872.*

No. 5.

IN Circular Order No. 1 of November 1872, after the words "Act XXVII of '1860," in the sixth line, insert the words "limited to such portions of the property of the estate as consists of the Government Securities which it is proposed to sell."

*How Column 18, Table 1 of Return No XVI, should be filled up.*

No. 6.

As there appears to be some misconception in respect to the mode of filling up column 18, Table 1 of Return No. XVI, District Officers are hereby informed that that column should show arrears that may remain unpaid after an estate is exempted from sale, and such arrears only. Arrears remaining unpaid on the last day of payment, but paid before exemption, should not be entered.

*Substitutes new Clauses for Clause 1a—1c and 1e—1g Section XII Chapter II of Rules regarding Coinage.*

No. 7.

THE following orders, issued by Government, are substituted for Clauses 1a, 1b, 1c, 1e, 1f, and 1g, Section XII, Chapter II, at page 32 of the Board's Rules:—

1a. When any silver coin, purporting to be coined and issued under the authority of the Government of India, is tendered to any of the officers authorized by this notification to act under Section 16 of the Indian Coinage Act 1870, who has reason to believe it to be counterfeit, or to have been reduced in weight otherwise than by reasonable wearing, he must cut and break such coin, and, under Section 16 of the said Act, return the pieces to the person tendering the coin.

1b. When any rupee or half-rupee, purporting to be coined and issued under the authority of the Government of India, is tendered to any such officer, who has reason to believe it to have lost by reasonable wear-

ing more than two per cent in weight, he must cut or break such coin, and at the option of the person tendering the coin, return to him the pieces, or retain them and pay to him their value at the rate of one rupee for one hundred eighty grains Troy weight.

1c. A quarter-rupee, or an eighth of a rupee, tendered to such an officer, must under Section 13 of the Act be accepted as legal tender for a fraction of a rupee, even though it have lost by reasonable wearing more than two per cent. in weight.

1d. If by reason of the obliteration of the device upon it, or for any other cause, any quarter-rupee, or eighth of a rupee, that shall come into the possession of such an officer shall appear to him to be unfit for further circulation, it is not to be cut or broken, but must, whatever be its weight, be withdrawn from circulation and dealt with in the manner prescribed in Clause 1e. But quarter-rupees and eighths of a rupee are not to be withdrawn from circulation if they appear to be otherwise fit to circulate, only because they have lost by reasonable wearing more than two per cent in weight.

1e. The pieces of coin cut or broken and paid for under clause 1b, and the coin withdrawn from circulation under clause 1d, must be sent by the first convenient opportunity to the Master of the Mint at Calcutta. Meanwhile, the actual sum paid for the cut or broken pieces, and the nominal value of the coin withdrawn, must be entered in the statement of the cash balance of the officer who has received them, as "uncurrent coin." Upon their receipt at the Mint, the Master of the Mint will give credit for them at the same values, and any loss incurred in their recoinage will be a charge of the Mint.

*Additions to Clause 4, page 179, Board's Rules.*

No. 8.

AFTER the words "real property," in the last line but one of Clause 4, page 197, Board's Rules, insert—"and should take immediate possession of such property on the part of Government." At the end of the same clause, add—"Should the Collector's action be opposed by any person actually in possession, he must desist from occupying the property, and report the circum-

## No. 23.

To all Civil and Criminal Authorities,—  
(dated Calcutta, the 3rd July 1872.)

At the instance of His Honor the Lieutenant-Governor of Bengal, the court is pleased to direct all Civil and Criminal Authorities under their control to submit their annual indents to the Superintendent of Stationery for the authorized judicial forms in use in their own and their subordinate courts during the month of April of each year.

2. Unless judicial indents are unusually large, they can, under ordinary circumstances, be all complied with within two months' time of their receipt. Emergent indents, however, can be sent in, and will be complied with at any time of the year. The Court, however, expect that the necessity for submitting such indents will only arise under exceptional circumstances, such as could not reasonably have been foreseen at the time of the submission of the annual indent.

3. Emergent indents should be sent in through the High Court.

## No. 25.

To all Civil Courts,—(dated Calcutta,  
the 15th July 1872.)

The High Court is very frequently called upon to pass orders upon applications made under Section 12, Code of Civil Procedure, by District and other Judges for leave to

proceed with the trial of suits for property situated within the limits of different districts, and also upon applications, chiefly from Courts of Small Causes, for orders to be made under Section 4 Act XXIII of 1861.

2. These applications, in a great number of instances, have not been accompanied by any sufficient statement of the facts of the case, and it seems to have been the common belief that such applications, and the orders of the High Court to be made upon them,

are mere matters of form. But the controlling power entrusted to the High Court by the Sections above mentioned, is meant, to be really exercised, and it cannot be exercised, without sufficient materials.

3. The Court therefore find it necessary to direct that in all applications under Section 12, Code of Civil Procedure, the facts shall be fully set forth, *i. e.* the names and residences of all the parties, and the nature and value of the different portions of the property in dispute, which are situated in various jurisdictions; and that when any of the defendants reside beyond the local jurisdiction of the Court in which the suit has been commenced, it shall appear that such defendants have had an opportunity of showing cause.

4. When the Court is asked to make an order under Section 4, Act XXIII of 1861, the facts should be similarly stated, and it should appear that, in the opinion of the Judge, it will be just and reasonable as regards defendants as well as plaintiffs, that the trial should take place in a jurisdiction within which one or more of them do not reside.

## No. 26.

ALL DISTRICT JUDGES AND JUDICIAL COMMISSIONERS.

Calcutta, the 3rd August 1872.

Are hereby informed, for their own guidance as well as for

that of the Civil Courts subordinate to them, that the High Court has resolved that Mooktears holding certificates under the rules which have been, or may be, passed by the Court under Section 4, Act XX of 1865, may be allowed access to the record rooms of Mofussil Civil Courts in order to facilitate the preparation by them of briefs for the use of Counsel or Vakeels.

By order of the High Court.

W. CORNELL,  
Offy. Registrar.



From F. B. PEACOCK, Esq., Registrar of the High Court of Judicature at Fort William in Bengal, to the Officiating Judge of the 24-Pargunnahs,—(No. 1830, dated Calcutta, the 6th July 1872.)

I AM directed to acknowledge the receipt of your letter No. 405, dated the 27th May last, wherein you solicit a re-consideration of the provision of C. O. No. 178,

dated 13th May 1861, which prohibits any charge being made for copies of decrees or judgments required by parties to a suit.

2. I am to inform you in reply that the Court have no power to declare that copies of judgments shall, as far as the parties to the suit are concerned, be charged for. The law (Section 198, Act VIII of 1859,) requires certified copies of decrees and judgments to be furnished to parties on the production of the necessary stamps. When, therefore, such stamps are put in by a party to the suit, a copy of the decree and judgment must be furnished to him without further cost.

3. With regard to your remark as to few, if any, of the old class of Office mohurris

in Moonsiffs' Courts knowing English, the Court observe that if this is so you should in future withhold your approval, under Section 36 of the Civil Courts' Act, if the Moonsiff should propose any establishment on which there was not at least one mohurir who knew English. If, in the meantime, copies of decrees and judgments cannot be made at the Chokkeys, they must be sent into the Judge's Office to be made there.

I have, &c,

F. B. PEACOCK,

*Registrar.*

Circular Memo. No. 13, dated High Court, the 27th July 1872.

HIGH COURT  
CIVIL SIDE  
Present  
The Hon'ble F. A. Glover,  
Judge

Copy forwarded to all District Judges and Judicial Commissioners for their information and guidance.

By order of the High Court,

W. CORNELL,

*Offg. Registrar.*

and transmit it with the proceedings in the suit to the Commissioner, who, after perusal of the petition of appeal and judgment, and after hearing the agent of the appellant, if any, may dismiss the appeal, or may remit the case to the lower court for the record of further evidence, or for re-trial on fresh issues, or receive the case for hearing before his own court to be held in the Khasi Hills, and shall confirm, modify, or reverse the decision of the lower court, passing such orders as to costs as may appear just. The decree of the appellate court shall be transferred to the court of the Deputy Commissioner for execution as a decree of its own.

37. The Courts of the Commissioner, Deputy and Assistant Commissioners, shall be guided by the spirit, but not bound by the letter, of the Code of Civil Procedure.

38. No professional pleader or mooktear shall be allowed to appear in any case, except in cases before the Deputy Commissioner or Assistant Commissioners, with the special permission of the judge trying the case, or if the defendant reside beyond the jurisdiction of the court, but relations may appear for persons incapacitated by age, sex, or sickness.

39. It shall be discretionary to examine witnesses on oath in any form, or to warn them that they are liable to the punishment of perjury if they state that which they know to be false.

A MACKENZIE,

*Offg. Secy. to the Govt. of Bengal.*

### Orders by the High Court of Judicature at Fort William in Bengal.

*The 22nd July 1872.*

IN supersession of the lists of subjects notified at page 2206 of the *Calcutta Gazette* of the 29th December 1869, and all previous orders or notifications of the Court, the following lists of subjects are hereby notified as those in which the candidates for the higher and lower grade pleaderships respectively will be examined under the rules passed by the High Court under Section 4, Act XX of 1865.

#### HIGHER GRADE.

##### *Subjects.*

1st.—The law of property current in Bengal.

A. With reference to the permanent settlement; to the Government lien on land; to claim to hold lands exempt from the payment of revenue, and to the mode in which estates can be brought to sale for arrears of revenue.

B. The law of under-tenures and the mode in which the same can be brought to sale for arrears of rent.

C. The relation of Landlord and Tenant.

D. Mortgages; Registration of Assurances.

E. The Hindoo Law of Inheritance, Succession, and Adoption.

F. Mahomedan Law.

G. The Indian Succession Act.

2nd.—Obligations arising from contracts.

3rd.—Civil Procedure.

4th.—The Law of Evidence.

5th.—The Law relating to Stamps.

6th.—The Law of Limitation.

7th.—Criminal Law and Procedure.

#### *Regulations, Enactments, and Text Books.*

Regulations (Bengal) I, VIII, X, XIV, XIX and XLIV of 1793, and the Regulations and Acts by which the same have been altered, Act XI of 1859, and the preamble to Regulation (Bengal) II of 1793.

Regulation (Bengal) VIII of 1819; Act VIII of 1865 (Bengal Council); Act VIII of 1869, B.C., (except as to candidates to practise in Orissa, Chota Nagpore, and Assam, who will be required, as heretofore, to pass in Act X of 1859)

Act VIII of 1869 (B.C.) except as above.

Macpherson on Mortgages; Act VIII of 1871.

Dayabhaga and Mitakshara, Dattaka Chaudrika, or Macnaghten's Principles of Hindoo Law, first seven chapters.

Macnaghten's Principles of Mahomedan Law, except chapter 9.

Act X of 1865; Act XXI of 1870.

Macpherson on Contracts; Act IX of 1872.

Act VIII of 1859; Act XXIII of 1861; Act XI of 1865.

Act I of 1872.

Act XVIII of 1869; Act VII of 1870.

Act IX of 1871.

The Indian Penal Code (Act XLV of 1860) and the Code of Criminal Procedure; Act X of 1872.

LOWE GRADU.

*Subjects.*

- 1st.—Hindoo Law.
- 2nd.—Mahomedan Law.
- 3rd.—Law of Contracts.
- 4th.—The law of property current in Bengal with reference to the permanent settlement; to the Government lien on land, to claims to hold lands exempt from the payment of Government revenue, and to the mode in which estates can be brought to sale for arrears of revenue.
- 5th.—The relation of Landlord and Tenant.
- 6th.—The Law relating to Putnee Talooks
- 7th.—The Law of Limitation.
- 8th.—The Law relating to Stamps.
- 9th.—Civil Procedure, including the Small Cause Court Act.
- 10th.—The Law of Evidence
- 11th.—Criminal Law and Procedure.

*Regulations, Enactments, and Text Books.*

Macnaghten's Principles of Hindoo Law, first seven chapters.

Macnaghten's Principles of Mahomedan Law, except chapter 9.

Macpherson on Contracts; Act IX of 1872. Regulations (Bengal) I, VIII, X, XIV, XIX, and XLIV of 1793, and the Regulations and Acts by which the same have been altered; Act XI of 1859, and the preamble to Regulation (Bengal) II of 1793.

Act VIII of 1869 (Bengal Council), except as to candidates in Orissa, Chota Nagpore, and Assam, who will be required to pass, as heretofore, in Act X of 1859.

Regulation (Bengal) VIII of 1819, Act VIII of 1865 (Bengal Council).

Act IX of 1871.

Act XVIII of 1869, Act VII of 1870.

Act VIII of 1859, Act XXIII of 1861; Act XI of 1865.

Act I of 1872.

Penal Code (Act XLV of 1860); Code of Criminal Procedure (Act X of 1872).



# THE LAW OBSERVER.

Vol: II.]

FEBRUARY 15, 1873.

[ No. 2.

*Ranee Doorgasoondury v. Bebee Oomdadoonissa, (1 L. O. p. 23, Civil Rulings) and Muddon Mohun Biswas v. W. Stalkart and others : (17 W. R. p. 441, Civil Rulings.)*

OUR correspondent O. N. M., whose letter we published in our last number, drew our attention to the decision of the High Court in Appeal No. 1 of 1872, under Section 15 of the Letters Patent, the case of *Ranee Doorgasoondury Dasse vs. Bebee Oomdadoonissa*, (1 L. O. p. 23, Civil Rulings) and we promised to discuss the question therein mooted by an early opportunity. We now hasten to redeem our promise.

It appears that *Ranee Doorgasoondury* sued in the Court of the Deputy Collector of Jessore for arrears of rent at enhanced rates in respect of a piece of land, situated in the Bazar of Jessore and occupied by a building, after due service of notice under Sec. 13, Act X of 1859. The defendant, among other objections, pleaded that the Revenue Court had no jurisdiction to entertain the suit. The Deputy Collector overruled the defendant's objection, and gave the plaintiff a decree. On appeal the Judge held, on the authority of *Kallee Mohun Chatterjea vs. Kalleekissen Roy*, (XI. W. R. p. 183) that the suit could not lie in the Revenue Court, and therefore dismissed the plaintiff's suit with costs. From this decision a special appeal was preferred to the High Court, and the case coming on for hearing before the Hon'ble F. A. B. Glover and the Hon'ble Dwarka Nath Mitter, the two learned Justices differed in opinion; the former holding, that the rent of

land used for building purposes could not be enhanced by a suit under Act X of 1859, and the latter being of opinion that the Revenue Court *had* jurisdiction to entertain the suit. The appeal against the judgment of Justice Glover was heard by the Hon'ble Chief Justice, the Hon'ble H. V. Bayley and the Hon'ble W. Ainslie, and the judgment of the Court was delivered by the Chief Justice, in which Justices Bayley and Ainslie concurred.

The learned Chief Justice said: "If, as Mr. Justice Mitter thinks, Sec. 6 of Act X applies, and the ryot holding such land for 12 years has a right of occupancy, Sec. 17 must also apply so far as the grounds for enhancement can be made applicable.

"But I think, in determining what is the meaning of *land*, and *holding land* in Act X, we must look at all the provisions of the Act. It may be assumed that it was not intended that one part of it should apply to one kind of land, and another part to another, and that land in Sec. 23 should have a different meaning from what it has in other Sections. The Deputy Collector says with truth, that it is extremely difficult to apply to Bazar lands, occupied merely as building ground, the provisions of Sec. 17 which are manifestly intended to be applied to the rent of land used for agricultural purposes. And these are not the only provisions of the Act of which that may be said. Sec. 112 and the following Sections can only apply to land used for cultivation. The intention of the Legislature is to be deduced from the whole Act and the construction which makes the whole of it consistent is to be preferred. I think this is the ground of the

decisions in this Court that lands used for building purposes are not liable to enhancement under Act X of 1859."

With reference to this judgment our correspondent says: "From a perusal of the decision of the Chief Justice in Rance Doorgasoodury's case (XVIII. W. R. p. 284) it would appear that the word 'land' in Act X of 1859 must be interpreted to bear one and the same meaning wherever it occurs in that Act, that in Sec. 112 *et seq.*: 'land' evidently means land used for agricultural purposes, and that therefore 'land' in Sec. 23 and in all other Sections must mean land used for such purposes only."

Now, the interpretation put upon the decision referred to by our correspondent appears to us to be correct, although the Chief Justice does nowhere say in his judgment *in so many words* that 'land' in Act X of 1859 means land used for agricultural purposes only. The inference, as drawn by our correspondent, is however plain enough.

Our correspondent thinks and indeed attempts to prove that the word 'land' cannot be interpreted to bear the same meaning wherever it occurs in Act X of 1859.

The word 'land,' as used in Clause 6, Section 23 of Act X of 1859, does not, according to our correspondent, include a *farm* or a *tenure*, while in Clause 4, Section 23, it does include the same. *Ergo*, the word cannot be construed in the *same* sense wherever it occurs in the Act.

Our correspondent's logic is certainly not at fault, although we cannot see very clearly that the word 'land' is used in *essentially different* senses in *different* portions of the Act. 'Land' we think means *land* wherever it occurs in Act X.

Our correspondent is certainly right when he says: "It is quite reasonable to hold that 'land' like any other word in Act X or in any other Act, must have its plain and ordinary meaning attached to it, unless where the context shows the contrary, or where it is defined by the Legislature in a particular sense." This proposition is certainly sound, and that being conceded, it appears to us to be

rather anomalous, that our correspondent should be betrayed into the following conclusion: "But considering that the word has not been defined by Act X, and considering that *most* undertenures consist *mostly* of agricultural lands, it would perhaps be improper not to accept as correct the particular interpretation put upon the term as used in Act X by the highest legal authority in this part of India."

Be that however as it may, it appears to us that the judgment of the Chief Justice alluded to is not sufficiently full. It seems to proceed more on the authority of the cases decided on the subject than on an independent interpretation of Clause 4, Section 23 of Act X of 1859. As there existed a conflict of decisions upon the point which the Court had to decide, it was expected that the conflicting decisions to which reference was made by Justices Glover and Mitter severally, should be reviewed *seriatim*, and a decision arrived at independently of the authority of any decided cases.

The learned Chief Justice says: "If, as Mr. Justice Mitter thinks, Sec. 6 of Act X applies, and a ryot holding land for 12 years has a right of occupancy, Sec. 17 must also apply, so far as the grounds for enhancement can be made applicable." His lordship attempts to employ here a sort of *reductio ad absurdum* process, in order to demolish the position assumed by Justice Mitter. Suppose, his lordship means to say, a ryot acquires a right of occupancy as held by Justice Mitter in respect of building lands under Sec. 6 Act X of 1859, the consequence would be monstrous, for then the provisions of Sec. 17 must also apply. We do not exactly see the absurdity of a zemindar or other person seeking to enhance the rent of building or other lands situated in a mofussil town in accordance with the provisions of Sec. 17, so far as they may be applicable. The grounds of enhancement as set forth in that section are:—

1. "That the rate of rent paid by such ryot (ryot with a right of occupancy) is below the prevailing rate payable by the same class of ryots for land of a similar

description and with similar advantages in the places adjacent.

2. "That the value of the produce or the productive powers of the land have been increased otherwise than by the agency of the ryot.

3. "That the quantity of land held by the ryot has been proved by measurement to be greater than the quantity for which rent has been previously paid by him."

Now, under the Act the rent of a ryot with a right of occupancy might be enhanced on any one or more of the grounds as above set forth. It will be seen that ground No. 2 only applies exclusively to lands used for agricultural purposes. Grounds No. 1 & 3 might apply to lands in general, irrespective of the use to which they were made subservient. Why cannot the rent of a holding, situated in a town, be enhanced on the ground of its containing more lands as ascertained by subsequent measurement than what it was believed to contain at the time when the tenancy commenced? Nor can we, for the life of us, understand why a tenant should not pay an amount of rent equal to what is paid by the same class of ryots for lands of a similar description with similar advantages in the places adjacent. Thus there does not appear to be anything peculiar in Sec. 17 which restricts its application to agricultural lands only.

Then again, the learned Chief Justice seems to take it for granted that the provisions of Sec. 6 applied only to lands used for agricultural purposes. According to his Lordship, it would appear, that none but a cultivator can acquire a right of occupancy. What his data for this opinion are, we are not told. Probably, he thinks the decisions of the High Court which take this view to be correct. Possibly they may be correct. It would, however, have been better if his lordship had said that in so many words, or adduced other reasons for limiting the application of this Section to land used for the purposes of cultivation. By referring to the Section, we find it to run thus:—"Every ryot who has cultivated or held land &c." Now, the

word 'held' is not synonymous with 'cultivated' nor is 'or' used here as an explanatory particle. The two words are distinct in their signification, and it cannot be supposed that the legislature were not aware of their true import and signification at the time the Act was drawn up. It is evident, therefore, that the legislature intended that a right of occupancy should be acquired by a person by his *cultivating* land or *holding*, that is, in other words, possessing the same, irrespective of the use to which it was put. Hence it cannot be said that the right is restricted only to the actual cultivator of the soil, or, as Justice Mitter says: "Sec. 6 says distinctly that a ryot who 'has held' land for 12 years consecutively is entitled to a right of occupancy exactly in the same way as a ryot who has 'cultivated' land for the same period." The language of the Section being as it is, we had a right to expect that his lordship the Chief Justice would give his own construction on the same independently of the decisions on the subject.

His lordship says: "But I think, in determining what is the meaning of *land* and *holding land* in Act X., we must look at all the provisions of the Act. It may be assumed, that it was not intended, that one part of it should apply to one kind of land, and another part to another, and that land in Sec. 23 should have a different meaning from what it has in other Sections."

Now, the first sentence embodies a truism. Certainly, an Act ought to be construed as a consistent whole by a reference to all its provisions. In the next sentence, however, in which his lordship assumes that the Act was intended to apply to *one kind of land only*, we cannot exactly realize the idea which his lordship intended to convey by the word 'kind,' that is, whether it had reference to the *quality* of the land or to the *use* which was made of it. We have said already that *land* is *land* and must mean land irrespective of the manner in which it was employed, unless the legislature defined it in any other way, or the context pointed to a different meaning.

His lordship again says: "Section 112 and the following Sections can only apply to land used for cultivation. The intention of the legislature is to be deduced from the whole Act, and the construction which makes the whole of it consistent is to be preferred." To be sure, this is the proper rule of construction, and there is not the least doubt that Section 112 and those that follow refer to lands used for cultivation. There is nothing, however, in those Sections which may be fairly construed to limit the meaning of the word 'land' in Clause 4, Section 23, to land used for cultivation only. Section 112 runs thus:—"The produce of the land is held to be hypothecated for the rent payable in respect thereof, and when an arrear of rent, as defined in Section 20 of this Act, is due from any *cultivator* of land &c." Now, this Section, as is evident from the phraseology used, applies to land used for cultivation only. It refers to a *particular class of land only*. The use of the word *cultivator* here is significant enough, and considerably favors the interpretation which Justice Mitter puts upon 'land' as used in Clause 4, Section 23. 'Land' as there used is general in its signification and includes all manner of lands whether in the possession of a putneedar, talookdar, farmer and ryot, or any other class of tenants or undertenants, (*vide* Dhunput Sing *vs.* Goman Sing, XI. Moore, p. 463) while 'the land' in Sec. 112 coupled with the word "cultivator" seems to restrict the meaning to a particular kind of land, viz., that used for cultivation. We do not exactly understand how Sec. 112 and the following Sections support the opinion of his lordship the Chief Justice. It is evident that by these Sections the legislature intended only to facilitate the collection of rent by distraint and sale of the produce of the land on account of which the arrear was due for the current year, and 'the land' referred to in them is only a particular class of land for which a particular provision was considered necessary to be made.

Besides, the privy Council have held in the case of Dhunput Sing to which

we have already referred, that a suit for arrears of rent at enhanced rates against a quasi-talookdar is cognizable in the Revenue Court under Clause 4, Sec. 23, Act X of 1859, upon the ground that the said clause "contains provisions for all classes of under-tenants." Now, a talook or an intermediate tenure contains not only agricultural lands but building and other lands as well. If a suit for arrears of rent at enhanced rates can be brought under Act X in respect of such talook or intermediate tenure, we fail to see why a similar suit in respect of a portion of such talook, occupied by a dwelling house, will not lie in the Revenue Court.

Indeed, the glorious uncertainty of the law would be not a little heightened if the use which was made of land determined the jurisdiction of the Courts. Justice Mitter says, "Suppose for instance, that a ryot cultivates his land with paddy for one year and then erects a building upon it or allows it to remain uncultivated in the next year. A suit for arrears of rent due for the first year would certainly be governed by Clause 4, Sec. 23, Act X of 1859, and I see no reason whatever why the same clause should not apply to a suit brought for the arrears of the next year."

But under the ruling under notice "a suit for the arrears of the next year," when there was a building on the land, must be brought in the Civil Court. Thus it depended upon the ryot only according to the use he made of his land to settle the question of jurisdiction in respect of a suit for the arrears of rent of such land. To-day the Revenue Court has jurisdiction to entertain such a suit, and a short time afterwards the Civil Court alone would be competent to entertain a similar suit. What an anomaly!

We think our correspondent's remarks on the decision of the High Court in the case of Muddon Mohun Biswas *vs.* Stalkart and others to be perfectly sound; and therefore further comments from us appear to be wholly uncalled for.



208	Fraudulently suffering a decree to pass for a sum not due, or suffering decrees to be executed after it has been satisfied.	Shall not arrest without warrant.	...	Bailable	...	Imprisonment of either description for 2 years, or fine, or both.	Magistrate of the 1st class.
209	False claim in a Court of Justice...	Ditto	...	Ditto	...	Imprisonment of either description for 2 years, and fine.	Ditto
210	Fraudulently obtaining a decree for a sum not due, or causing a decree to be executed after it has been satisfied.	Ditto	...	Ditto	...	Imprisonment of either description for 2 years, or fine, or both.	Ditto.
211	False charge of offence made with intent to injure.	Ditto	...	Ditto	...	Ditto	Ditto.
	If offence charged be capital or punishable with transportation for life, or imprisonment for 7 years, or upwards.	Ditto	...	Ditto	...	Imprisonment of either description for 7 years and fine.	Court of Session.
212	Harbouring an offender if the offence be capital.	May arrest without warrant.	...	Ditto	...	Imprisonment of either description for 5 years, and fine.	Court of Session or Magistrate, 1st class.
	If punishable with transportation for life, or with imprisonment for 10 years.	Ditto	...	Ditto	...	Imprisonment of either description for 3 years, and fine.	Ditto.
	If punishable with imprisonment for 1 year, and not for 10 years.	Ditto	...	Ditto	...	Imprisonment for $\frac{1}{2}$ of the longest term, and of the description provided for the offence, or fine, or both.	By the Magistrate of the 1st class, or by the Court by which the offence is triable.

## CHAPTER XI.—FALSE EVIDENCE AND OFFENCES AGAINST PUBLIC JUSTICE—Continued.

1 Section	2 OFFENCE.	3 Whether the Police may arrest without warrant or not.	4 Whether a warrant or summons shall ordinarily issue in the first instance	5 Whether bailable or not.	6 Punishment under the Indian Penal Code.	7 By what Court triable
213	Taking gift, &c. to screen an offender from punishment, if the offence be capital.	Shall not arrest without warrant.	...	Bailable	Imprisonment of either description for 7 years, and fine.	Court of Session.
	If punishable with transportation for life, or with imprisonment for 10 years.	Ditto	Ditto	Ditto	Imprisonment of either description for 3 years, and fine	Court of Session or Magistrate of the 1st class.
	If with imprisonment for less than 10 years.	Ditto	Ditto	Ditto	Imprisonment for $\frac{1}{4}$ of the longest term, and of the description provided for the offence, or fine, or both.	By a Magistrate of the 1st class, or by the Court by which the offence is triable.
214	Gift made to cause restoration of property in consideration of screening offender, if the offence be capital.	Ditto	Ditto	Ditto	Imprisonment of either description for 7 years, and fine.	Court of Session.

If punishable with transportation for life, or with imprisonment for 10 years.	Ditto	Ditto	Ditto	Imprisonment of either description for 3 years, and fine.	Court of Session or Magistrate of the 1st class.
If with imprisonment for less than 10 years.	Ditto	Ditto	Ditto	Imprisonment for $\frac{1}{2}$ of the longest term, and of the description provided for the offence, or fine, or both.	By a Magistrate of the 1st class, or by the Court by which the offence is triable.
215 Taking gift to help to recover movable property of which a person has been deprived by an offence, without causing apprehension of offender.	Ditto	Ditto	Ditto	Imprisonment of either description for 2 years, or fine, or both.	Magistrate of the 1st class.
216 Harbours an offender who has escaped from custody, or whose apprehension has been ordered, if the offence be capital.	May arrest without warrant.	Ditto	Ditto	Imprisonment of either description for 7 years, and fine.	Court of Session or Magistrate of the 1st class.
If punishable with transportation for life, or with imprisonment for 10 years.	Ditto	Ditto	Ditto	Imprisonment of either description for 3 years, and fine.	Ditto.
If with imprisonment for 1 year and not for 10 years.	Ditto	Ditto	Ditto	Imprisonment for $\frac{1}{2}$ of the longest term, and of the description provided for the offence, or fine, or both.	By a Magistrate of the 1st class, or by the Court by which the offence is triable.

## CHAPTER XI.—FALSE EVIDENCE AND OFFENCES AGAINST PUBLIC JUSTICE.—Continued.

Section	2	3	4	5	6	7
	OFFENCE.	Whether the Police may arrest without warrant or not.	Whether a warrant or a summons shall ordinarily issue in the first instance.	Whether bailable or not.	Punishment under the Indian Penal Code.	By what Court triable.
217	Public servant disobeying a direction of law with intent to save persons from punishment, or property from forfeiture.	Shall not arrest without warrant	Summons	Bailable	Imprisonment of either description for 2 years, or fine, or both.	Magistrate of the 1st or 2nd class.
218	Public servant framing an incorrect record or writing with intent to save person from punishment, or property from forfeiture.	Ditto	Warrant	Ditto	Imprisonment of either description for 3 years, or fine, or both.	Court of Session.
219	Public servant in a judicial proceeding making or pronouncing an order, report, verdict, or decision which he knows to be contrary to law.	Ditto	Ditto	Ditto	Imprisonment of either description for 7 years, or fine, or both.	Ditto.
220	Commitment for trial or confinement by a person having authority who knows that he is acting contrary to law.	Ditto	Ditto	Ditto	Ditto	Ditto.
221	Intentional omission to apprehend on the part of a public servant bound by law to apprehend an offender, if the offence be capital.	Ditto	Ditto	Ditto	Imprisonment of either description for 7 years with or without fine.	Ditto.

If punishable with transportation for life, or imprisonment for 10 years.	Ditto	...	Ditto	..	Ditto	... Imprisonment of either description for 3 years, with or without fine.	... Court of Session or Magistrate of the 1st class.
If with imprisonment for less than 10 years.	Ditto	..	Ditto	...	Ditto	... Imprisonment of either description for 2 years, with or without fine.	Magistrate of the 1st or 2nd class.
222 Intentional omission to apprehend on the part of a public servant bound by law to apprehend person under sentence of a Court of Justice, if under sentence of death.	Ditto	...	Ditto	..	Not bailable	... Transportation for life, or imprisonment of either description for 14 years, with or without fine.	... Court of Session.
If under sentence of transportation for life, or imprisonment or penal servitude for 10 years or upwards.	Ditto	..	Ditto	..	Ditto	... Imprisonment of either description for 7 years, with or without fine.	Ditto.
If under sentence of imprisonment for less than 10 years.	Ditto	..	Ditto	...	Bailable	... Imprisonment of either description for 3 years, or fine, or both.	... Court of Session or Magistrate of the 1st class.
223 Escape from confinement negligently suffered by a public servant.	Ditto	...	Summons	...	Ditto	... Simple imprisonment for 2 years, or fine, or both.	Magistrate of the 1st or 2nd class.
224 Resistance or obstruction by a person to his lawful apprehension.	May arrest without warrant	...	Warrant	...	Ditto	Imprisonment of either description for 2 years, or fine, or both.	Ditto.

## CHAPTER XI.—FALSE EVIDENCE AND OFFENCES AGAINST PUBLIC JUSTICE—Concluded.

1 Section	2 OFFENCE.	3 Whether the Police may arrest with- out warrant or not	4 Whether a warrant or a summons shall ordinarily issue in the first instance.	5 Whether bail- able or not.	6 Punishment under the Indian Penal Code.	7 By what Court triable.
225	Resistance or obstruction to the lawful apprehension of another person, or rescuing him from lawful custody.	May arrest with- out warrant. ..	Warrant ... Bailable	..	Imprisonment of either des- cription for 2 years.	Magistrate of the 1st or 2nd class.
	If charged with an offence punishable with transportation for life, or imprisonment for 10 years.	Ditto ..	Ditto ... Not bailable...	..	Imprisonment* of either des- cription for 3 years, and fine.	Court of Ses- sion or Ma- gistrate of the 1st class.
	If charged with a capital offence ..	Ditto ..	Ditto ...	..	Imprisonment of either des- cription for 7 years, or fine.	Court of Ses- sion.
	If the person is sentenced to trans- portation for life, or to transport- ation, penal servitude, or im- prisonment for 10 years or up- wards.	Ditto ..	Ditto ...	..	Ditto ... Ditto	Ditto.
	If under sentence of death ..	Ditto ..	Ditto ...	..	Transportation for life, or im- prisonment of either descrip- tion for 10 years, and fine.	Court of Ses- sion.
225A	Escape, or attempt to escape, from custody for failing to furnish security for good behaviour.	Ditto ..	Ditto ... Bailable	..	Imprisonment of either des- cription for one year, or fine, or both.	Magistrate of 1st or 2nd class.

226	Unlawful return from transportation.	Ditto	...	Not bailable...	Transportation for life, and fine and rigorous imprisonment for 3 years before transportation.	of Session.
227	Violation of condition of remission of punishment.	Shall not arrest without warrant.	...	Ditto	Punishment of original sentence, or if part of the punishment has been undergone, the residue.	By the Court by which the original offence was triable.
228	Intentional insult or interruption to a public servant sitting in any stage of a judicial proceeding.	Ditto	...	Bailable	Simple imprisonment for 6 months, or fine of 1,000 rupees, or both.	Court in which the offence is committed, subject to the provisions contained in Chapter XXXII of this Code.
229	Personation of a juror or assessor...	Ditto	...	Ditto	Imprisonment of either description for 2 years, or fine, or both.	Magistrate of 1st class.

## CHAPTER XII.—OFFENCES RELATING TO COIN AND GOVERNMENT STAMPS.

231	Counterfeiting or performing any part of the process of counterfeiting Coin.	May arrest without warrant	...	Not bailable...	Imprisonment of either description for 7 years, and fine.	Court of Session.
232	Counterfeiting or performing any part of the process of counterfeiting the Queen's Coin.	Ditto	...	Ditto	Imprisonment of either description for 10 years, and fine.	Ditto.



## CHAPTER XII.—OFFENCES RELATING TO COIN AND GOVERNMENT STAMPS—Continued.

1 Section	2 OFFENCE.	3 Whether the Police may arrest without warrant or not.	4 Whether a warrant or a summons shall ordinarily issue in the first instance.	5 Whether bailable or not.	6 Punishment under the Indian Penal Code.	7 By what Court triable.
233	Making, buying, or selling instrument for the purpose of counterfeiting Coin.	Shall not arrest without warrant.	Warrant	Bailable	Imprisonment of either description for 3 years, and fine.	Court of Session or Magistrate of the 1st class.
234	Making, buying, or selling instrument for the purpose of counterfeiting the Queen's Coin.	Ditto	Ditto	Ditto	Imprisonment of either description for 7 years, and fine.	Court of Session.
235	Possession of instrument or material for the purpose of using the same for counterfeiting Coin.	Ditto	Ditto	Ditto	Imprisonment of either description for 3 years, and fine.	Court of Session or Magistrate of the 1st class.
	If Queen's Coin	Ditto	Ditto	Ditto	Imprisonment of either description for 10 years, and fine.	Court of Session.
236	Abetting in India the counterfeiting out of British India of Coin.	Ditto	Ditto	Ditto	The punishment provided for abetting the counterfeiting of such coin within British India.	Ditto.

237	Import or export of counterfeit. May arrest with Warrant Coin knowing the same to be, out warrant. counterfeit.	Ditto	...	Not bailable ...	Imprisonment of either des- cription for 3 years, and fine.	Court of Ses- sion or Magistrate of the 1st class.
238	Import or export of counterfeits of the Queen's Coin, knowing the same to be counterfeit.	Ditto	...	Ditto	Transportation for life, or im- prisonment of either des- cription for 10 years, and fine.	Court of Ses- sion.
239	Having any counterfeit Coin known to be such when it came into possession, and delivering, &c., the same to any person.	Ditto	...	Ditto	Imprisonment of either des- cription for 3 years, and fine.	Court of Ses- sion or Ma- gistrate of the 1st class.
240	The same with respect to the Queen's Coin.	Ditto	...	Ditto	Imprisonment of either des- cription for 10 years, and fine.	Ditto.
241	Knowingly delivering to another any counterfeit Coin as genuine which when first possessed the deliverer did not know to be counterfeit.	Ditto	...	Ditto	Imprisonment of either des- cription for 2 years, or fine, of ten times the value of the coin counterfeited, or both.	Magistrate of the 1st or 2nd class.
242	Possession of counterfeit Coin by a person who knew it to be counterfeit when he became pos- sessed thereof.	Ditto	...	Ditto	Imprisonment of either des- cription for 3 years, and fine.	Court of Ses- sion or Ma- gistrate of the 1st class.
243	Possession of Queen's Coin by a person who knew it to be counter- feit when he became possessed thereof.	Ditto	...	Ditto	Imprisonment of either des- cription for 7 years, and fine	Ditto.
244	Persons employed in a Mint caus- ing Coin to be of a different weight or composition from that fixed by law.	Ditto	...	Ditto	Ditto	Court of Ses- sion.

## CHAPTER XII.—OFFENCES RELATING TO COIN AND GOVERNMENT STAMPS—Continued.

1	2	3	4	5	6	7
Section	OFFENCE.	Whether the Police may arrest without warrant or not.	Whether a warrant or summons shall ordinarily issue in the first instance.	Whether bailable or not.	Punishment under the Indian Penal Code.	By what Court triable.
245	Unlawfully taking from a Mint any coining instrument.	May arrest without warrant.	Warrant	Not bailable ..	Imprisonment of either description for 7 years and fine.	Court of Session.
246	Fraudulently diminishing the weight or altering the composition of any Coin.	Ditto ..	Ditto	Ditto ..	Imprisonment of either description for 3 years and fine.	Court of Session or Magistrate of the 1st class.
247	Fraudulently diminishing the weight or altering the composition of the Queen's Coin.	Ditto ..	Ditto	Ditto ..	Imprisonment of either description for 7 years and fine.	Ditto.
248	Altering appearance of any Coin with intent that it shall pass as a Coin of a different description.	Ditto ..	Ditto	Ditto ..	Imprisonment of either description for 3 years and fine.	Ditto.
249	Altering appearance of the Queen's Coin with intent that it shall pass as a Coin of a different description.	Ditto ..	Ditto	Ditto ..	Imprisonment of either description for 7 years and fine.	Ditto.
250	Delivery to another of Coin possessed with the knowledge that it is altered.	Ditto ..	Ditto	Ditto ..	Imprisonment of either description for 5 years and fine.	Ditto.
251	Delivery of Queen's Coin possessed with the knowledge that it is altered.	Ditto ..	Ditto	Ditto ..	Imprisonment of either description for 10 years, and fine.	Ditto.

252	Possession of altered Coin by a person who knew it to be altered when he became possessed thereof.	Ditto	...	Ditto	...	Ditto	...	Imprisonment of either description for 3 years, and fine.	Ditto.
253	Possession of Queen's Coin by a person who knew it to be altered when he became possessed thereof.	Ditto	..	Ditto	...	Ditto	...	Imprisonment of either description for 5 years, and fine.	Ditto.
254	Delivery to another of Coin as genuine, which, when first possessed, the deliverer did not know to be altered.	Ditto	...	Ditto	..	Ditto	...	Imprisonment of either description for 2 years, or fine of ten times the value of the Coin.	Magistrate of the 1st or 2nd class.
255	Counterfeiting a Government stamp.	Ditto	..	Ditto	...	Bailable	...	Imprisonment of either description for 10 years, and fine.	Court of Session.
256	Having possession of an instrument or material for the purpose of counterfeiting a Government stamp.	Ditto	..	Ditto	..	Ditto	...	Imprisonment of either description for 7 years, and fine.	Ditto.
257	Making, buying or selling instrument for the purpose of counterfeiting a Government stamp.	Ditto	..	Ditto	...	Ditto	...	Ditto	Ditto.
258	Sale of counterfeit Government stamp.	Ditto	..	Ditto	...	Ditto	...	Ditto	Ditto.
259	Having possession of a counterfeit Government stamp.	Ditto	..	Ditto	..	Ditto	...	Ditto	Court of Session, or Magistrate of the 1st class.
260	Using as genuine a Government stamp known to be counterfeit.	Ditto	..	Ditto	...	Ditto	...	Imprisonment of either description for 7 years, or fine, or both.	Ditto.

## CHAPTER XII.—OFFENCES RELATING TO COIN AND GOVERNMENT STAMPS—Continued.

1 Section	2 OFFENCE.	3 Whether the Police may arrest without warrant or not.	4 Whether a warrant or a summons shall ordinarily issue in the first instance.	5 Whether bailable or not.	6 Punishment under the Indian Penal Code.	7 By what Court triable.
261	Effacing any writing from a substance bearing a Government stamp, or removing from a document a stamp used for it with intent to cause wrongful loss to Government.	May arrest without warrant.	Warrant	Bailable	Imprisonment of either description for 3 years, or fine, or both.	Court of Session or Magistrate of the 1st class.
262	Using a Government stamp known to have been before used.	Ditto	Ditto	Ditto	Imprisonment of either description for 2 years, or fine, or both.	Magte. of the 1st or 2nd class.
263	Erasure of mark denoting that stamp has been used.	Ditto	Ditto	Ditto	Imprisonment of either description for 3 years, or fine, or both.	Court of Session or Magistrate of the 1st class.

## CHAPTER XIII.—OFFENCES RELATING TO WEIGHTS AND MEASURES.

1 Section	2 OFFENCE.	3 Whether a warrant or a summons shall ordinarily issue in the first instance.	4 Whether bailable or not.	5 Whether a warrant or a summons shall ordinarily issue in the first instance.	6 Punishment under the Indian Penal Code.	7 By what Court triable.
264	Fraudulent use of false instrument for weighing.	Shall not arrest without warrant.	Summons	Bailable	Imprisonment of either description for 1 year, or fine, or both.	Magte. of the 1st or 2nd class.
265	Fraudulent use of false weight or measure.	Ditto	Ditto	Ditto	Ditto	Ditto.

265	Being in possession of false weights or measures for fraudulent use.	Ditto	...	Ditto	...	Ditto	...	Ditto	...	Ditto.
267	Making or selling false weights or measures for fraudulent use.	Ditto	...	Ditto	...	Ditto	...	Ditto	...	Ditto.

## CHAPTER XIV.—OFFENCES AFFECTING THE PUBLIC HEALTH, SAFETY, CONVENIENCE, DECENCY AND MORALS.

269	Negligently doing any act known to be likely to spread infection of any disease dangerous to life.	May arrest without warrant.	...	Summons	...	Bailable	...	Imprisonment of either description for 6 months, or fine, or both.	...	Magt. of the 1st or 2nd class.
270	Malignantly doing any act known to be likely to spread infection of any disease dangerous to life.	Ditto	...	Ditto	...	Ditto	...	Imprisonment of either description for 2 years, or fine, or both.	...	Ditto.
271	Knowingly disobeying any quarantine rule.	Shall not arrest without warrant	...	Ditto	...	Ditto	...	Imprisonment of either description for 6 months, or fine, or both.	...	Ditto.
272	Adulterating food or drink for man, intended for sale, so as to make the same noxious.	Ditto	...	Ditto	...	Ditto	...	Imprisonment of either description for 6 months, or fine of 1,000 rupees, or both.	...	Ditto.
273	Selling any food or drink as food and drink for man knowing the same to be noxious.	Ditto	...	Ditto	...	Ditto	...	Ditto	...	Ditto.
274	Adulterating any drug or medical preparation intended for sale so as to lessen its efficacy, or to change its operation, or to make it noxious.	Ditto	...	Ditto	...	Ditto	...	Ditto	...	Ditto.

## CHAPTER XIV.—OFFENCES AFFECTING THE PUBLIC HEALTH, SAFETY, CONVENIENCE, DECENCY AND MORALS—Continued.

Section	2 OFFENCE.	3 Whether the Police may arrest without warrant or not.	4 Whether a warrant or a summons shall ordinarily issue in the first instance.	5 Whether bailable or not.	6 Punishment under the Indian Penal Code.	7 By what Court triable.
275	Offering for sale or issuing from a dispensary any drug or medical preparation known to have been adulterated.	Shall not arrest without warrant	Summons	Bailable	Imprisonment of either description for 6 months, or fine of 1,000 rupees or both.	Magt. of the 1st or 2nd class.
276	Knowingly selling or issuing from a dispensary any drug or medical preparation as a different drug or medical preparation.	Ditto	Ditto	Ditto	Ditto	Ditto.
277	Defiling the water of a public spring, or reservoir.	May arrest without warrant.	Ditto	Ditto	Imprisonment of either description for 3 months, or fine of 500 rupees, or both.	Any Magistrate.
278	Making atmosphere noxious to health.	Shall not arrest without warrant.	Ditto	Ditto	Fine of 500 rupees	Ditto.
279	Driving or riding on a public way so rashly or negligently as to endanger human life, &c.	May arrest without warrant.	Ditto	Ditto	Imprisonment of either description for 6 months, or fine of 1,000 rupees, or both.	Ditto.
280	Navigating any vessel so rashly or negligently as to endanger human life, &c.	Ditto	Ditto	Ditto	Ditto	Magte. of the 1st or 2nd class.
281	Exhibition of a false light, mark, or buoy.	Ditto	Warrant	Ditto	Imprisonment of either description for 7 years, or fine or both.	Court of Session



282	Conveying for hire any person by water in a vessel in such a state, or so loaded as to endanger his life.	Ditto	...	...	Imprisonment of either description for 6 months, or fine of 1,000 rupees, or both.	Magistrate of the 1st or 2nd class.
283	Causing danger, obstruction, or injury in any public way or line of navigation.	Ditto	...	Ditto	Fine of 200 rupees	Ditto.
284	Dealing with any poisonous substance so as to endanger human life, &c.	Shall not arrest without warrant.	Ditto	...	Imprisonment of either description for 6 months, or fine of 1,000 rupees, or both	Ditto.
285	Dealing with fire or any combustible matter so as to endanger human life, &c.	May arrest without warrant.	Ditto	...	Ditto	Any Magistrate.
286	So dealing with any explosive substance.	Ditto	Ditto	...	Imprisonment of either description for 6 months, or fine of 1,000 rupees, or both	Ditto.
287	So dealing with any machinery.	Shall not arrest without warrant	Ditto	...	Ditto	Magistrate of the 1st or 2nd class.
288	A person omitting to guard against probable danger to human life by the fall of any building, over which he has a right entitling him to pull it down or repair it.	Ditto	Ditto	...	Ditto	Ditto.
289	A person omitting to take order with any animal in his possession, so as to guard against danger to human life, or of grievous hurt, from such animal.	May arrest without warrant.	Ditto	...	Ditto	Any Magistrate.

## CHAPTER XIV.—OFFENCES AFFECTING THE PUBLIC HEALTH, SAFETY, CONVENIENCE, DECENCY AND MORALS—Continued.

1 Section.	2 OFFENCE.	3 Whether the Police may arrest with- out warrant or not.	4 Whether a warrant or a summons shall ordinarily be issued in the first instance.	5 Whether bail- able or not.	6 Punishment under the Indian Penal Code.	7 By what Court triable.
290	Committing a public nuisance.	Shall not arrest without warrant.	Summons	Bailable	... Fine of 200 rupees	Any Magis- trate.
291	Continuance of nuisance after in- junction to discontinue.	May arrest with- out warrant.	Ditto	Ditto	Simple imprisonment for 6 months, or fine, or both.	Magistrate of the 1st or 2nd class.
292	Sale, &c., of obscene books, &c.	Ditto	Warrant	Ditto	Imprisonment of either des- cription for 3 months, or fine, or both.	Ditto.
293	Having in possession obscene book, &c., for sale or exhibition.	Ditto	Ditto	Ditto	Ditto	Ditto.
294	Obscene songs	Ditto	Ditto	Ditto	Ditto	Ditto.
294A	Keeping lottery office	Shall not arrest without warrant	Summons	Ditto	Imprisonment of either des- cription for 6 months, or fine, or both.	Any Magis- trate.
	Publishing proposals relating to lotteries.	Ditto	Ditto	Ditto	Fine of 1,000 rupees	Ditto.

## CHAPTER XV.—OFFENCES RELATING TO RELIGION.

295	Destroying, damaging, or defiling a place of worship or sacred object with intent to insult the religion of any class of persons.	May arrest without warrant.	...	Ballable	... Imprisonment of either description for 2 years, or fine, or both.	Magistrate of the 1st or 2nd class.
296	Causing a disturbance to an assembly engaged in religious worship.	Ditto	...	Ditto	... Imprisonment of either description for 1 year, or fine, or both.	Ditto.
297	Trespassing in a place of worship or sepulture, disturbing funeral with intention to wound the feelings or to insult the religion of any person, or offering indignity to a human corpse.	Ditto	...	Ditto	... Ditto	Ditto.
298	Uttering any word or making any sound in the hearing, or making any gesture, or placing any object in the sight of any person, with intention to wound his religious feeling.	Shall not arrest without warrant.	...	Ditto	... Ditto	Ditto.

## CHAPTER XVI.—OFFENCES AFFECTING THE HUMAN BODY.

*Offences affecting life.*

302	Murder	...	...	May arrest without warrant.	...	Not bailable...	Death, transportation for life, and fine.	Court of Session.
303	Murder by a person under sentence of transportation for life.	...	...	Ditto	...	Ditto	Death ...	Ditto

## CHAPTER XVI.—OFFENCES AFFECTING THE HUMAN BODY.—Continued.

## Offences affecting life.—Continued.

1 Section	2 OFFENCE.	3 Whether the Police may arrest with- out warrant or not.	4 Whether a warrant or a summons shall ordinarily issue in the first instance.	5 Whether bail- able or not.	6 Punishment under the Indian Penal Code.	7 By what Court triable.
304	Culpable homicide not amounting to murder if act by which the death is caused, is done with intention of causing death, &c. If act is done with knowledge that it is likely to cause death, but without any intention to cause death, &c.	May arrest with- out warrant.	Warrant	Not bailable...	Transportation for life, or im- prisonment of either descrip- tion for 10 years, and fine.	Court of Session.
304A	Causing death by rash or negligent act.	Ditto	Ditto	Ditto	Imprisonment of either des- cription for 10 years, or fine, or both.	Ditto
305	Abetment of suicide committed by a child, or insane or delirious, person or an idiot, or a person intoxicated.	Ditto	Ditto	Not bailable...	Imprisonment of either des- cription for two years, or fine, or both.	Court of Session or Magis- trate of the 1st class.
306	Abetting the commission of suicide.	Ditto	Ditto	Ditto	Death, or transportation for 10 years, and fine.	Court of Ses- sion.
307	Attempt to murder	Ditto	Ditto	Ditto	Imprisonment of either des- cription for 10 years, and fine.	Ditto
					Ditto	Ditto

308	If such act cause hurt to any person.	Ditto	...	Ditto	...	Ditto	...	Transportation for life, or as above.	Ditto.
	Attempt to commit culpable homicide.	Ditto	...	Ditto	...	Ditto	Bailable	Imprisonment of either description for 3 years, or fine, or both.	Ditto.
	If such act cause hurt to any person.	Ditto	...	Ditto	...	Ditto	Ditto	Imprisonment of either description for 7 years, or fine, or both.	Ditto.
	Attempt to commit suicide.	Ditto	...	Ditto	...	Ditto	Ditto	Simple imprisonment for 1 year, and fine.	Magistrate of the 1st or 2nd class.
311	Being a thug ...	Ditto	...	Ditto	...	Ditto	Not bailable	Transportation for life, and fine.	Court of Session.

*Of the causing of Miscarriage; of injuries to unborn children; of the exposure of infants; and of the concealment of births.*

312	Causing miscarriage ...	Shall not arrest without warrant.	...	Warrant	...	Bailable	...	Imprisonment of either description for 3 years, or fine, or both.	Court of Session.
	If the woman be quick with child.	Ditto	...	Ditto	...	Ditto	...	Imprisonment of either description for 7 years, and fine.	Ditto.
313	Causing miscarriage without woman's consent.	Ditto	...	Ditto	...	Not bailable	...	Transportation for life, or imprisonment of either description for 10 years, and fine.	Ditto.
314	Death caused by an act done with intent to cause miscarriage.	Ditto	...	Ditto	...	Ditto	...	Imprisonment of either description for 10 years, and fine.	Ditto.

## CHAPTER XVI.—OFFENCES AFFECTING THE HUMAN BODY—Continued.

*Of the causing of Miscarriage ; of injuries to unborn children ; of the exposure of infants ; and of the concealment of births—continued.*

1 Section	2 OFFENCE.	3 Whether the Police may arrest with- out warrant or not.	4 Whether a warrant or a summons shall ordinarily issue in the first instance.	5 Whether bail- able or not.	6 Punishment under the Indian Penal Code.	7 By what Court triable
	If act done without woman's con- sent.	Shall not arrest without war- rant.	Warrant	Bailable	... Transportation for life, or as above.	Court of Ses- sion.
315	Act done with intent to prevent a child being born alive, or to cause it to die after its birth.	Ditto ..	Ditto	Ditto	... Imprisonment of either des- cription for 10 years, or fine, or both.	Ditto.
316	Causing death of a quick unborn child by an act amounting to culpable homicide.	Ditto ..	Ditto	Ditto	... Imprisonment of either des- cription for 10 years, and fine.	Ditto.
317	Exposure of a child under 12 years of age by parent of person hav- ing care of it with intention of wholly abandoning it.	May arrest with- out warrant.	Ditto	Ditto	... Imprisonment of either des- cription for 7 years, or fine, or both.	Ditto.
318	Concealment of birth by secret dis- posal of dead body.	Ditto ..	Ditto	Ditto	... Imprisonment of either des- cription for 2 years, or fine, or both.	Court of Session or Magistrate of the 1st or 2nd class.

## Of Hurt.

323	Voluntarily causing hurt	... Shall not arrest without warrant.	...	Bailable	... Imprisonment of either description for 1 year, or fine of 1,000 rupees, or both.	Any Magistrate.
324	Voluntarily causing hurt by dangerous weapons or means.	May arrest without warrant.	...	Ditto	Imprisonment of either description for 3 years, or fine, or both.	Court of Session or Magistrate of the 1st or 2nd class.
325	Voluntarily causing grievous hurt.	Ditto	...	Ditto	Imprisonment of either description for 7 years, and fine.	Ditto.
326	Voluntarily causing grievous hurt by dangerous weapons or means.	Ditto	...	Not bailable	Transportation for life, or imprisonment of either description for 10 years, and fine.	Court of Session or Magistrate of the 1st class.
327	Voluntarily causing hurt to extort property or a valuable security, or to constrain to do an illegal act which may facilitate the commission of an offence.	Ditto	...	Ditto	Imprisonment of either description for 10 years, and fine.	Court of Session.
328	Administering stupefying drug with intent to cause hurt.	Ditto	...	Ditto	Ditto	Ditto.
329	Voluntarily causing grievous hurt to extort property or a valuable security, or to constrain to do an illegal act which may facilitate the commission of an offence.	Ditto	...	Ditto	Transportation for life, or imprisonment of either description for 10 years, and fine.	Ditto.



## CHAPTER XVI.—OFFENCES AFFECTING THE HUMAN BODY—Continued.

## Of Hurt—Continued.

1	2	3	4	5	6	7
Section	OFFENCE.	Whether the Police may arrest without warrant or not.	Whether a warrant or a summons shall ordinarily issue in the first instance.	Whether bailable or not.	Punishment under the Indian Penal Code.	By what Court triable.
330	Voluntarily causing hurt to extort confession or information, or to compel restoration of property, &c.	May arrest without warrant.	Warrant	... Bailable	... Imprisonment of either description for 7 years, and fine.	... Court of Session.
331	Voluntarily causing grievous hurt to extort confession or information, or to compel restoration of property, &c.	Ditto	Ditto	... Not bailable	... Imprisonment of either description for 10 years, and fine.	Ditto.
332	Voluntarily causing hurt to deter public servant from his duty.	Ditto	Ditto	... Bailable	... Imprisonment of either description for 3 years, or fine, or both:	... Court of Session or Magistrate of the 1st class.
333	Voluntarily causing grievous hurt to deter public servant from his duty.	Ditto	Ditto	... Not bailable	... Imprisonment of either description for 10 years, and fine.	... Court of Session.
334	Voluntarily causing hurt on grave and sudden provocation, not intending to hurt any other than the person who gave the provocation.	Ditto	Summons	... Bailable	... Imprisonment of either description for 1 month, or fine of 500 rupees, or both.	Any Magistrate.

335	Causing grievous hurt on grave and sudden provocation, not intending to hurt any other than the person who gave the provocation.	Ditto	..	Ditto	...	Ditto	..	Imprisonment of either description for 4 years, or fine of 2,000 rupees, or both.	Court of Session or Magistrate of the 1st, or 2nd class.
336	Doing any act which endangers human life or the personal safety of others.	Ditto	...	Ditto	..	Ditto	...	Imprisonment of either description for 3 months, or fine of 250 rupees, or both.	Any Magistrate.
337	Causing hurt by an act which endangers human life, &c.	Ditto	...	Ditto	..	Ditto	...	Imprisonment of either description for 6 months, or fine of 500 rupees, or both.	Magistrate of the 1st or 2nd class.
338	Causing grievous hurt by an act which endangers human life, &c.	Ditto	...	Ditto	...	Ditto	...	Imprisonment of either description for 2 years, or fine of 1,000 rupees, or both.	Ditto.

*Of wrongful Restraint and wrongful Confinement.*

341	Wrongfully restraining any person.	May arrest without warrant.	...	Summons	...	Bailable	..	Simple imprisonment for 1 month, or fine of 500 rupees, or both.	Any Magistrate.
342	Wrongfully confining any person	Ditto	..	Ditto	..	Ditto	...	Imprisonment of either description for 1 year, or fine of 1,000 rupees, or both.	Magistrate of the 1st or 2nd class.
343	Wrongfully confining for three or more days.	Ditto	...	Ditto	...	Ditto	...	Imprisonment of either description for 2 years, or fine or both.	Ditto.

## CHAPTER XVI.—OFFENCES AFFECTING THE HUMAN BODY—Continued.

*Of wrongful restraint and wrongful confinement—Continued.*

1 Section	2 OFFENCE.	3 Whether the Police may arrest with- out warrant or not.	4 Whether a warrant or a summons shall ordinarily issue in the first instance.	5 Whether bail- able or not.	6 Punishment under the Indian Penal Code.	7 By what Court triable
343	Wrongfully confining for ten or more days.	May arrest with- out warrant.	Summons	... Bailable	Imprisonment of either des- cription for 3 years, and fine.	Court of Ses- sion, or Ma- gistrate of the 1st or 2nd class.
345	Keeping any person in wrongful confinement, knowing that a writ has been issued for his liberation.	Shall not arrest without warrant	Ditto	Ditto	Imprisonment of either des- cription for 2 years, in ad- dition to imprisonment under any other section.	Ditto.
346	Wrongful confinement in secret.	May arrest with out warrant.	Ditto	Ditto	Ditto	Ditto.
347	Wrongful confinement for the purpose of extorting property, or constraining to an illegal act, &c.	Ditto	Ditto	Ditto	Imprisonment of either des- cription for 3 years, and fine.	Ditto.
348	Wrongful confinement for the purpose of extorting confession or information, or of compelling restoration of property, &c.	Ditto	Ditto	Ditto	Ditto	Court of Session or Magistrate of the 1st class.

Lordships consider that, at the highest, no more has been alleged and proved in this case, than a family custom regulating the descent *inter se*, and which, if existing, the settlement, of itself, did not disturb.

It was also urged that the effect of the custom was to create successive life estates in the heirs male of this family, analogous to a feudal entail, which could not be barred, and which prevented alienation, or any change in the manner of descent, which it was contended would be a virtual alienation. It will be collected from what has been already said, that their Lordships do not consider that such is, as a question of tenure, the nature of the estate, and in their view the family custom alleged in this case has not this effect.

Their Lordships cannot find any principle or authority for holding that in point of law a manner of descent of an ordinary estate, depending solely on family usage may not be discontinued; so as to let in the ordinary law of succession. Such family usages are in their nature different from a territorial custom, which is the *lex loci* binding all persons within the local limits in which it prevails. It is of the essence of family usages that they should be certain, invariable and continuous, and well established discontinuance must be held to destroy them. This would be so when the discontinuance has arisen from accidental causes; and the effect cannot be less, when it has been intentionally brought about by the concurrent Will of the family. It would lead to much confusion and abundant litigation, if the law attempted to revive and give effect to usages of this kind, after they had been clearly abandoned, and the abandonment had been, as in this case, long acted upon.

Their Lordships can have no doubt that in this case the special custom of descent, if it ever existed, was designedly discontinued after Raj Singh's death by Bishonath and his brothers—and that in fact the estate was enjoyed by the brothers and by their widows according to the ordinary law of succession, and on the footing that the custom was, at an end—and not only that there was this enjoyment in fact, but that the parties were registered in the public registers, and suits were brought against third persons by the brothers and widows, on the assumption that they were co-heirs and co-sharers of a joint family estate.

Frankishen, the Plaintiff in this suit, appears at one time to have been disposed to

dispute what had been done, and to set up the special mode of descent; but in the suit brought by himself against the alleged adopted son of his uncle Juggernath, already referred to, he claimed the one-third of the estate which Juggernath held, as his heir, and succeeded in setting aside the alleged adoption, and established his own right as heir to his uncle. He thus abandoned in that suit the custom which, in the present, he asserts to be still in existence. Supposing, therefore, that Frankishen had any inchoate right to the customary succession as the eldest son of Bishonath, their Lordships consider that the suit referred to affords proof of his ultimate adoption of what his father had done; and the presumption of acquiescence is strengthened by the fact that he did not prosecute the Appeal in the suit brought by his father Bishonath, in which the custom had been negatived.

Their Lordships are glad to be able to uphold the judgment of the High Court, since by doing so, they confirm the possession and enjoyment of this estate as it has existed since the death of Raj Singh, and maintain the order of succession which has in fact prevailed since the settlement in 1790.

In the view which their Lordships have taken of the case it becomes unnecessary to consider the point that the suit was barred by the Law of Limitation of suits.

Their Lordships being of opinion, for the reasons above given, that the decree of the High Court ought to be upheld, will humbly advise Her Majesty to affirm it, and to dismiss this Appeal with costs.

THE 30TH NOVEMBER, 1872.

Present :

Sir JAMES W. COLVILLE,  
 „ BARNES PEACOCK,  
 „ MONTAGUE E. SMITH,  
 „ ROBERT P. COLLIER,  
 „ LAWRENCE PEEL.

*Hindoo Law—Adoption—Misrepresentation—Estoppel—Pleading—New Cause.*

*On Appeal from the High Court of Judicature, North-Western Provinces, Agra.*

Gopee Lall,

versus

Mussamut Sree Chundraolee Buhoojee.

1. It being settled law that a man cannot, while he has an adopted son living, adopt another son, it follows that he cannot delegate to others, to be exercised after his death, any greater power than he himself possessed in his lifetime.

2. Defendants having represented that an adoption was made, a fact which forms the basis of the plaintiff's claim, cannot be said to have misrepresented a fact. An erroneous conclusion upon a point of law creates no estoppel whatever between the parties.

3. Even supposing that a plaintiff was misled by representations made by defendants into framing his suit in a particular manner, the rule of law that a man must recover according to her allegations and proofs could not be departed from nor would that circumstance enable their Lordships in Privy Council to allow an entirely new case to be brought before them, which is not even set up or hinted at in the plaintiff.

THIS was a suit brought to recover possession of a temple and certain jewels and valuables held therewith. The plaintiff claimed as heir of one Luchmunjee.\* He endeavoured to prove his heirship in this way. He asserted that his grandfather Damodurjee had two wives, Luchmee and Charmuttee; that, shortly before his death, he gave a power to his wives to adopt two sons; that after his death, his first widow Luchmee adopted Gobindjee, the father of the plaintiff; that some four years afterwards, the second widow Charmuttee adopted Luchmunjee, through whom the plaintiff claims. The plaintiff asserts that on the death of Luchmunjee, who according to his case was his uncle, he became the heir to Luchmunjee, who was in possession of the property. He admits that the defendant, the widow of Luchmunjee, had a life-interest in the property, but he alleges that she had forfeited that life-interest by committing waste.

The Principal Sudder Ameen found in effect that the plaintiff had proved the whole of his case. The High Court reversed the decision of the Principal Sudder Ameen: they expressed themselves by no means satisfied that the defendant had forfeited the property by committing waste; but they deemed it unnecessary to decide this question, inasmuch as they came to the conclusion that the plaintiff had failed to prove his heirship to Luchmunjee. They

no means satisfied that the plaintiff he facts on which he relied; but the conclusion that, assuming be proved, as the plaintiff in point of law his case

according to valid suggestion of the widow

Atchama and others,\* reported in the 4th volume of Moore's Privy Council Appeals, p. 1; and since the decision of that case whatever doubts may have been entertained on the question before, it must be considered as settled law that a man cannot, while he has an adopted son living, adopt another son. And in their Lordships' opinion, it follows on principle that a man cannot delegate to others, to be exercised after his death, any greater power than he himself possessed in his life-time; and that inasmuch as he, Damodurjee, could not, one adopted son being living, adopt another, his second widow Charmuttee could not, by virtue of any authority delegated from him, adopt a son while an adopted son was still living.

Their Lordships therefore concur with the judgment of the High Court, which amounts to this that, assuming all the plaintiff's facts as he alleges them in his own favor, still that in point of law the second adoption was invalid, and that consequently there was no relationship between him and the second adopted son Luchmunjee, under whom he claims.

That being so, their Lordships do not think it necessary to give an opinion as to whether the facts on which the plaintiff relies have been substantiated, or not. Assuming them to have been substantiated, his case in point of law fails.

It has been argued on the part of the appellant that the defendants in this case are estopped from setting up the true facts of the case, or even asserting the law in their favor, inasmuch as they have represented in former suits and in various ways, by letters and by their actions, that Luchmunjee was the adopted son of Damodurjee adopted by Damodurjee's widow, his mother. But it appears to their Lordships that there is no estoppel in the case. There has been no misrepresentation on the part of Luchmunjee or the defendant on any matter of fact. They are alleged to have represented that Luchmunjee was adopted. The plaintiff's case is that Luchmunjee was in fact adopted. So far as the fact is concerned, there is no misrepresentation. It comes to no more than this that they have arrived at a conclusion that the adoption which is admitted in fact was valid in law, a conclusion which in their Lordships' judgment is erroneous; but that

proven by all these facts they came to the conclusion that the plaintiff had failed to prove his heirship to Luchmunjee. They no means satisfied that the plaintiff he facts on which he relied; but the conclusion that, assuming be proved, as the plaintiff in point of law his case according to valid suggestion of the widow

Wrongfully more days

creates no estoppel whatever between the parties.

It may further be observed that, if Luchmunjee's statement is to be taken, it must be taken a whole; and what he asserts is that he was validly adopted. But if he was validly adopted, it follows that the plaintiff was invalidly adopted; and therefore in this view of the case, it appears to their Lordships that no reliance can be placed upon this question of estoppel.

It has indeed been further argued that, even putting it not so high as estoppel, still the plaintiff has been misled, by various representations made by the defendant, into framing his suit as it is now framed. If that were so, it would not empower their Lordships to depart from the rule which has always prevailed that a man must recover according to his allegations and his proofs. It would not enable their Lordship to allow (as the appellant asks them to allow) an entirely new case to be now brought forward before them, which is not even set up or hinted at in the plaint.

The new case suggested appears to be that, assuming an invalid adoption of Luchmunjee, and treating Luchmunjee as a mere trespasser, still the plaintiff could recover by proof of his title from Damodurjee. Whether he has such a case or not, their Lordships do not think it necessary to decide, but they feel themselves bound to say that that case cannot be gone into, inasmuch as it has not been set up in the plaint. Their Lordships do not desire to construe plaints with any extreme strictness or technicality, but it would manifestly be extremely inconvenient, and certainly contrary to their practice, to allow a case to be raised here which is entirely different from the one which has been previously insisted upon.

For these reasons their Lordships are of opinion that the decree of the High Court is right and ought to be affirmed. Their Lordships understand the High Court simply to have ruled that the plaintiffs had failed to prove the title on which they sued, that the Principal Sudder Ameen's decree ought therefore to be reversed, and the suit dismissed with costs. But inasmuch as the formal decree, which simply orders that the appeal be decreed with costs, and the decision of the Principal Sudder Ameen reversed, may hereafter lead to some doubt as to what was really decided by the High

Court, their Lordships think that the formal decree should be varied by ordering that the decision of the Principal Sudder Ameen be reversed, and the suit dismissed with costs in both Courts; and their Lordships will humbly advise Her Majesty to this effect. The appellants must pay the costs of this appeal.

16TH DECEMBER 1872.

*Present:*

The Hon'ble Sir R. COUCH, ... *Chief Justice.*

and

„ J. B. PHEAR,

„ F. A. GLOVER,

„ DWARKA NATH MITTER,

„ W. AINSLIE,

} *Judges.*

No. 148 OF 1872.

*Miscellaneous Special Appeal from a Decision of W. Cornell, Esq., Officiating Judge of Mymensingh, dated 8th February 1872, accruing a decree of Baboo Nilcomul Newgee Officiating Moonsiff of Nikbe, dated the 4th October 1871.*

Mr. J. P. Wise (decree-holder) ... *Appellant,*  
*versus*

Rajnarain Chuckerbutty and  
others (judgment-debtors), } *Respondents.*

*For Appellant.*—Mr. C. Gregory and Baboo  
Doorga Mohun Dass.

*For Respondents.*—Baboo Boicunt Nath Dass.

When a decree separately defines the liability of each of the persons against whom it is passed, the proceedings in execution taken against one of such persons are not sufficient to prevent the law of limitation applying to the others.

The decree sought to be executed was one for arrears of putnee rent. By it the Moonsiff of Niklee in 1855 made one Mr. Gasper liable to pay rent for some months of 1259, and one Goury Sunker for such portion of the claim as was not barred by limitation. This decree was modified on 28th August 1856, by the Principal Sudder Ameen who allowed the whole claim "against the persons in possession."

The first proceedings in execution were taken in 1860, against Goury Sunker, and a portion of the amount due under the decree was realized. The case was then struck off on 30th December 1862. It was revived on the 14th April 1864. A certifi-

cate as required by the law was then sent to the Moonsiff of Dowlat Khan in Backergunge, to enable the decree-holder to proceed against a Mr. Bagram as executor under the last Will and Testament of Gasper. The case was registered in the said Moonsiff's Court on the 9th December 1864, and then struck off on the 24th idem. The case was then revived on the 21st January 1867, when Mr. Bagram stated that he was liable to pay rent only for some months of 1259 and the Moonsiff, on 22nd June 1867, considered the objection to be good and valid. The Judge of Backergunge, however, on appeal, held on 31st October 1867, that all the judgment-debtors were equally liable. The High Court on 12th September 1868, held on special appeal that Bagram was separately liable for the rent of 1259. The execution case was then sent back to the Moonsiff of Niklee, and registered then on 22nd July 1870, to enable the decree-holder to take proceedings against Goury Sunker. Goury Sunker having died, the case was struck off on 27th January 1871, after service of notice on his heirs. The case was then revived on 11th February 1871, and on 3rd June 1871, the heirs of Goury Sunker objected to the execution on the ground that no proceedings had been taken against Goury Sunker within three years of the present application. The Moonsiff overruled the objection. The Judge in appeal held that the decree as against Goury Sunker was barred by lapse of time. Hence the appeal to the High Court.

The case came on for hearing before the Chief Justice and Mr. Justice Bayley, and there having been conflicting decisions on the point involved, it was referred to a Full Bench by the following order of reference.

*Couch C. J. (Bailey J. Concurring.)*—We think the decisions reported at page 80, W. R., Vol. VIII, and page 10, W. R., Vol. X, are conflicting. The case must therefore be referred to a Full Bench.

The facts of this case are stated in the judgment of the Moonsiff, and the question which arises and is referred to a Full Bench is, whether in the case of such a decree as was sought to be executed in this case, proceedings in execution against one of the defendants, are sufficient to prevent the law of limitation applying to process of execution against the other.

The decisions which are applicable, viz., 8 W. R. 80 and 10 W. R. 10 are conflicting.

The decree in this suit, it will be seen, has been held by this Court to be one declaring the defendants to be separately liable for portion of the rent decreed. In the former of these cases, it was held that where a decree has been passed against several defendants, each of whom is declared to have a separate liability in respect of a definite amount, execution against one or more of them keeps the decree in force against all simultaneously. In the latter case it was held that where a decree is not a joint one against all the defendants, but a separate one as against each batch of defendants, the proceedings against one batch have no effect towards keeping alive the separate decrees against other batches. In this case the learned Judges said they did not consider there was any difference of opinion between them and the Judges in the former case; that the Judges in that case thought that the decree before them was joint and several, and considered that the joint liability of the defendants was kept alive by proceedings against any single one. This appears to be a mistake, for Mr. Justice Jackson in his judgment in the former case, says, "It has frequently been held in this Court where the decree has passed against several defendants declaring them to be jointly and severally liable, that execution against one or more of such judgment-debtor keeps the decree in force as against all. The contention in this case is that the defendants were not declared to have under the decree a joint and several liability, but each a separate liability in respect of definite amounts. There is no precedent of this Court hearing upon the point." The decrees in both cases were of the same nature, and if one is to be held to be joint it would seem that the other ought to be. We therefore refer to a Full Bench the question before stated.

*Couch, C. J.*—The question which is put to the Full Bench is, whether in case of such a decree as was sought to be executed in this case, the proceedings in execution against one of the defendants are sufficient to prevent the law of limitation applying to process of execution against the other.

The suit appears to have been brought to recover arrears of rent for 28 years, and it appears that one of the defendants Gourie Sunker had been in possession up to a certain time, and that then the possession had been transferred by sale and purchase from



him to Mr. Gasper, and there was no joint liability. Each person was liable for the rent for the period during which he or she had occupied, and the decree was in the first instance made by the Moonsiff apparently in that form. The Principal Sudder Ameen appears to have modified that on an appeal, and to have declared that the rent was to be allowed for the whole time against the persons in possession. That was in reality the same thing, but leaving the period for which each would be liable to be determined in the execution of the decree. Subsequently the High Court appears from the proceedings to have declared that that was so, and Mr. Bagram who represented Mr. Gasper was declared to be separately liable for the rent of 1259. Although these persons were joined in the suit in this way, yet we must treat the decree as what it must have been by law, a decree against one person for the rent of one period and a decree against the other person for the rent of another; and and I think such a decree as this, although it is on one piece of paper, is in fact two decrees, a separate decree against each for the sum for which each is liable. When we come to apply to that the terms of section 20 of the law of limitation, there is really no difficulty, the decree is to be kept in force against each and to be treated as a separate decree against each, in such a case of persons sued for contribution, because it is a separate liability and each is liable only for his own share.

I think that although the decree is made in one suit, it is in reality and substance a separate decree against each for the portion for which each is declared to be liable. We must answer the question which is put to us, that in such a case as this, the proceedings are not sufficient to prevent the law of limitation applying to the other defendant.

The case will go back to the division bench with that answer.

*Phear, J.*—I entirely concur.

*Glover, J.*—I concur.

*Mitter and Ainslie, J. J.*—I concur.

THE 19TH DECEMBER 1872.

Present :

The Hon'ble Sir RICHARD

COUCH, Knight, ... Chief Justice.

The Hon'ble F. A. B. GLOVER } Judges.

„ DWARKANATH MITTER }

CASE No. 38 OF 1872.

*Regular Appeal from a Decision passed by the Subordinate Judge of Zillah Outtack, dated the 12th of October 1873.*

Baboo Ramgobind Juggodeb }  
one of the (Defts.) ... } Appellant.

versus

Chowdhry Poornonnd Sutroosool Mohappars, Nityanund Biswul, Soorut Biswul, Dheyomonee Mullick, Joykishto Mullick, and Hur Gopal Bose, who appeared, and Nistarinee Dassee who did not appear in this appeal (Plffs.) ... } Respondents.

Appeal valued at Rs. 40,000-0-0.

*For Appellant.*—Baboo Unnodapersad Banerjee.

*For Respondent.*—The Officiating Advocate General.

In a civil suit to set aside a sale made by a Deputy Collector on the ground of fraud and collusion, the decision of the Deputy Collector that the notices of sale had been served is certainly very cogent evidence between the parties, and then there is no ground, in the absence of evidence of fraud and collusion, for a suit which, if successful, would reverse the decision of the Deputy Collector.

*Sir R. Couch, Chief Justice, and Glover, Mitter, J. J. concurring.*—The plaintiffs in this case sued to set aside a sale which was made by the Deputy Collector of the sub-division Kendraparah in execution of a decree, and they alleged that they were the owners of twelve annas of a Mourosee Surborakaree, and that the first defendant obtained a decree under Act X of 1859 and sued out execution of it, and in order to possess himself of the Mourosee Surborakaree in question he colluded with the defendant No. 2, and that by taking fraudulent and dishonest proceedings, contrary to law, he brought to sale the property on the 29th of November 1869, and purchased it for 12,000 Rupees.

The Subordinate Judge, when the case came before him for hearing, framed various issues, the second of which was, were the notices for its sale affixed as required by Section 4, Act VIII of 1865 (Bengal Council) on some conspicuous place on the land comprising the tenure, and in the town or village in or nearest to which that land is situated. He framed no issue, expressly, upon the question whether there was fraud or collusion in the proceedings relating to

the sale; he seems to have considered that the substantial question which he had to determine was that raised by the second of the issues which he framed, whether the notices of sale were not properly given, and to have thought that if the notices of sale were not properly given, there must be fraud and collusion. That is the only way in which I can suppose, he considered it unnecessary, especially to frame any issue as to fraud and collusion. He found upon the second issue that the notices were not properly given, and passed a decree in favor of the plaintiff, considering, as he says, that he had power, not directly to set aside the sale, but to do that which was in reality, as admitted by the learned Advocate General, a setting aside of the sale; because he directed that it should have no effect upon the title of the plaintiffs, and that they were to have possession in the same way as if there had been no sale.

It appears, in the proceedings, that the plaintiffs, when the sale was about to take place, raised an objection to it before the Deputy Collector, and that the Deputy Collector, in consequence of a remand by the the Collector with instructions to take evidence as to the service of the notice of sale, inquired into that matter and took evidence, and decided that the notice of sale was properly given. Witnesses were produced on both sides, and apparently, much the same kind of evidence was given before him as was given before the Subordinate Judge with one exception, as it appears from the judgment of the Deputy Collector, that a witness deposed to the first defendant having given him bribe to give false evidence, which witness was not called to give that evidence before the Subordinate Judge, an omission which was not without its significance with regard to the trustworthiness of the plaintiff's case.

But the Deputy Collector, as I have said, after taking evidence found that the notices of sale were properly given. That decision was confirmed on appeal by the Collector and also by the Commissioner.

It appears to me that if this decision of the Deputy Collector, on a matter which it was certainly within his jurisdiction to try, namely, whether the notices of sale had been duly given, is not to be considered as absolutely conclusive between the parties to the present suit, who are the same persons as

were parties to that proceeding, it is certainly very cogent evidence, that the notices required by law were duly given before the sale; and although it may be said that the Subordinate Judge, having the witnesses before him, could form a better judgment of their demeanour than this Court can, and that some weight ought on that account to be attached to his finding upon the evidence; on the other hand it may be said that the Deputy Collector also had the witnesses before him, and was probably quite as competent to form an opinion as to whether they were deserving of credit as the Subordinate Judge was. He also had the advantage of making the inquiry and taking the evidence at a period nearer to the transaction in question than the Subordinate Judge had, and the fact remarked upon by the Subordinate Judge, which he seems to give to some extent as his reason for deciding in plaintiff's favor, that there was great particularity in the evidence given by the witness for the defendant, may be explained by the circumstance that these persons had at a comparatively recent time, after the transaction, given their evidence before the Deputy Collector, and it is most likely that they had an opportunity of having their memory refreshed by what they had said on that occasion, because there must have been some record of it.

So that if we had had to determine this question as one of fact, independently of the decision of the Deputy Collector, I should certainly, upon this evidence, have come to the conclusion that the notices were properly served, and that the evidence given for the defendant is more satisfactory than that given for the plaintiff. But I do not propose to make any comment upon that evidence. It appears to me that the decision of the Deputy Collector must be taken as deciding between these parties that the notices had been properly served, and if they had been, there is no foundation for any charge of fraud or collusion in the matter. There is no evidence on the part of the plaintiff of fraud and collusion. If the notices were regularly served, there is, according to the decisions of this Court, in which I entirely agree, no ground for a fresh suit, as ground for a suit which, if successful, would reverse the decision of the Deputy Collector. If there had been evidence, as Sir Barnes Peacock says, of those

proceedings having been taken by fraud and collusion, the suit might have been entertained; but there is nothing of the kind here. It is quite evident to my mind that what these plaintiffs sought to do on the present occasion was to get the decision of a competent Court, that of the Deputy Collector, reversed by a suggestion of fraud and collusion of which there is no evidence. I think that the decision of the Subordinate Judge must be reversed, and the suit must be dismissed with costs.

THE 3RD JANUARY, 1873.

*Present :*

The Hon'ble SIR R. COUCH, KT., *Chief Justice,*  
and

The Hon'ble W. MARKBY, *Judges.*

*Appeal from a Decision passed by Justice  
A. G. Macpherson, on 5th June, 1872, in the  
Ordinary Original Civil Side of the High  
Court.*

Prosono Coomar Ghose, ... (*Def't.*) *Appl't.*,  
*versus*

Tarrucknath Sircar, ... (*Pl't.*) *Rept.*

H, a Hindu executed a Will as follows :—

"I give, devise, and bequeath unto my wife L and her heirs and assigns for ever, all my real and personal estate and effects, and do appoint my said wife sole executrix of this my Will."

Held that the words of this Will unequivocally show that it was the testator's intention that his widow should become the absolute owner of his property. It is not necessary that there should be an express declaration of a man's desire to disinherit his sons, if there is an actual gift to some other person expressed in clear and unequivocal words.

THIS was an appeal from a decree made by Mr. Justice Macpherson in the exercise of the Ordinary Original Civil Jurisdiction of the Court, and dated the 5th June 1872. The facts of the case, together with the arguments and judgment in the Lower Court, having been fully reported in the *Englishman* of the 13th and 14th June, it will be sufficient to repeat that the suit was brought by the plaintiff, the present respondent, for the declaring of trusts, and to recover certain shares in a family dwelling-house; and that the case turned upon the construction to be put upon the will of one Hurronundo Sircar, the grand-father of both parties, who died in 1833. This will was very short, and the material part of it was as follows: "I give, devise, and bequeath unto my wife, Sreemutty Luckeymoney Dossee, and her heirs and assigns for ever, all my real and personal estate and effects, and do appoint my said

wife sole executrix of this my will." Luckeymoney executed a deed of gift of the property, the subject of this suit, which was part of the estate of Hurronundo, in favor of the appellant, defendant in the Lower Court, who was the son of her daughter, and it was contended on behalf of the plaintiff, the son of the son of Hurronundo and Luckeymoney, that this deed was void, inasmuch as the will, if construed with reference to Hindu law, and to the habits and customs of Hindus, gave Luckeymoney no absolute interest, but merely appointed her to be trustee and manager of the estate for the benefit of the sons of the testator; and, further, that if the property of Hurronundo passed to Luckeymoney as a gift to her by her husband after marriage, it became her *stridhan*, and inalienable, and that the plaintiff would succeed to it on her death as heir. His Lordship, Mr. Justice Macpherson, held that the plaintiff's contention was right, and said:—"Considering that the will is the will of a Hindu, and that that Hindu, when he made the will, had two infant sons, and considering that there is no expression or indication anywhere of a desire to disinherit his sons, and in reason, why he should disinherit them, I think I must assume that he did not mean to disinherit them, and that the will must be taken as merely making over the property to his wife, to be held by her in trust for the infant heirs. I agree with Mr. Justice Phear in what he says in his judgment in the unreported case of *Bhooplall Kheltry vs. Mohim Churn Roy*, (decided on the 12th September 1870), and I think it impossible to assume that a Hindu meant to disinherit his only sons when there is no express declaration of his desire or intention to do so, and no reason is shown for his disinheriting them." As to the plaintiff's second contention, his lordship held that, on the view he took of the case, it was unnecessary for him to express any opinion as to whether the property was or was not to be taken as Luckeymoney's *stridhan*. Against this decision the defendant appealed.

*Mr. Woodroffe and Mr. Branson for the appellant.*

*Mr. Kennedy and Mr. Ghose for the respondent.*

*Couch, C. J.*—The plaintiff and the defendant in this suit, which comes before us on appeal from the decision of Mr. Justice

Macpherson, are the grandsons of Hurronundo Sircar, the plaintiff being the son of a son, and the defendant of a daughter. Hurronundo Sircar died in 1833, leaving a widow, Luckeymoney Dossee, and two sons, Shamachurn and Woomachurn, and a daughter Roymoney. Shamachurn died in 1849 without issue, leaving a widow, who died in 1855 or 1856. Woomachurn died in 1854, leaving one son. The plaintiff, Roymoney, is still living, and the defendant is her son. Hurronundo Sircar made a will in English, which was apparently prepared by an English attorney, but is signed by the testator himself in Bengalee. It consists of only a few lines, and the following is the material part of it:—

"I give, devise, and bequeath unto my wife, Sreemutty Luckemoney Dossee, and her heirs and assigns for ever, all my real and personal estate and effects, and do appoint my said wife sole executrix of this my will."

Luckeymoney Dossee, after the death of her husband, obtained probate of this will in the late Supreme Court; and by the practice of the Court, it was necessary before probate would be granted to file an affidavit that the will had been explained to the testator. Luckeymoney Dossee possessed herself of all the estate and effects of her deceased husband; but her sons, Shamachurn and Woomachurn, who were young children at the time of the death of their father, always lived with her, and substantially had the enjoyment of the property along with her, and, on the evidence of the defendant, Prosono Coomar himself, it appears that Shamachurn and Woomachurn, after they had attained to years of discretion, used to assist her in the management of the property, although everything was done in her name. Luckeymoney, on one or two occasions, sold portions of the property which belonged to Hurronundo's estate; and on these occasions the conveyances were made by her. One of them, dated the 3rd of February 1849, has been put in, and in that she states that she sells the property, her husband "*having given a *turnee namah will**" in her name. Whilst this bill of sale was given by Luckeymoney, as being the person having the right to convey, both Shamachurn and Woomachurn, who were the heirs of Hurronundo Sircar, signed the conveyance as witnesses. This proceeding, Mr. Justice Macpherson

says, is well understood among natives as indicating that the sons, being parties having an interest, gave their consent to the sale being made, but in the case he refers to in another part of his judgment, reported in 13 Moore's L. A., 209, the Judicial Committee say they cannot affirm the proposition that the mere attestation of such an instrument by a relative necessarily imports concurrence.

Shamachurn's widow, Rampriosi, having died, Luckeymoney very shortly afterwards executed a deed of gift to the defendant, Prosono Coomar Ghose, of the property which is the subject of this suit. That deed is dated the 18th of October 1856, and in it the property is described as being property "which was given to me, and has been held and enjoyed by me up to this time."

Two or three months before her death, Luckeymoney Dossee made a will in which she says:—"My late husband, Hurronundo Sircar, having made a will on the 22nd day of September of the English year 1833, granted all his movable and immovable property to me. Thereafter, upon his death, I, having obtained the whole of his property by virtue of his will, am possessing and enjoying the same from that time up to the present as owner of the right of gift and sale thereof, and I have alienated some of these properties." Then she says that she has already given, out of the properties granted by her husband, a six annas share of the family house to the defendant, Prosono Coomar Ghose, by deed of gift, and she goes on to bequeath the remaining immovable properties which she then had, and her entire movable property, to her son's son, Tarrucknath Sircar. She then proceeds to appoint the defendant, Prosono Coomar Ghose, as executor and manager during his minority, and to declare that the whole estate should go to Prosono Coomar Ghose absolutely in the event of Tarrucknath Sircar dying a minor without issue, or of his renouncing the Hindu religion.

The suit is brought by Tarrucknath Sircar, who claims the whole of the property, and he asked that it might be declared that under and by virtue of the will of Hurronundo Sircar, Luckeymoney Dossee, had no power to devise the property included therein. Mr. Justice Macpherson made a decree in the plaintiff's favor, holding that the will of Hurronundo Sircar must be read as merely making over the property to the wife, to be

held by her in trust for the infant heirs. He says in his judgment:—"There is no doubt that the question which has been raised is one of great importance to Hindus as bearing upon the question of the principles upon which the Courts ought to act in construing wills made by Hindus." I quite agree to this, but it appears to me that the principles upon which the Court ought to act have been authoritatively determined, and in the present case we have only to apply them. In *Sree-mutty Soorjeemoney Dossee 'vs. Denabundo Mullick* (6 Moo. I. A., 526), the Judicial Committee (page 550) say:—"The Hindu law, no less than the English law, points to the intention as the element by which we are to be guided in determining the effect of a testamentary disposition; nor, so far as we are aware, is there any difference between the one law and the other as to the materials from which the intention is to be collected. Primarily the words of the will are to be considered. They convey the expression of the testator's wishes; but the meaning to be attached to them may be affected by surrounding circumstances, and where this is the case, those circumstances must no doubt be regarded. Amongst the circumstances thus to be regarded is the law of the country under which the will is made, and its dispositions are to be carried out: If that law has attached to particular words a particular meaning, or to a particular disposition, a particular effect, it must be assumed that the testator, in the dispositions which he had made, had regard to that meaning or to that effect, unless the language of the will or the surrounding circumstances displace that assumption. These are, as we think, the principles by which we ought to be guided in determining the case before us; and we must first, therefore, consider what was the intention of this testator to be collected from the words of his will."

Although the will was signed by the testator in Bengalee, I think it must now be assumed that it was explained to him, and that he understood its meaning. If it was not, and he did not understand what he was signing, there would be no question of construction, for it would not be his will. Probate of it was granted by the Supreme Court, and its validity has never been questioned. Mr. Justice Macpherson says, he has no doubt the whole family thought that Luckeymoney was absolute owner of the

property, and had the right to dispose of it at pleasure. It appears to me that the words of this will unequivocally show that it was the testator's intention that his wife should become the absolute owner of all his property. That is the meaning which the law has attached to the words he has used, and there is nothing in the language of the will to displace the assumption that he had regard to it, for the appointment of his wife as sole executrix is made with the view to complete the gift and enable her to obtain probate.

The surrounding circumstances are, as Mr. Justice Macpherson says, that the testator was a Hindu, and that he had at that time two infant sons, and there was no reason why he should desire to disinherit them. We cannot tell what reason he had for making a will, but the fact of his doing so shows, in my opinion, that he intended his wife to be something more than trustee and manager for the infant heirs, as she would have been such if he had not made a will. It is not to be assumed that he made this will without reason, and if he, being a Hindu, thought it right to make a will, it may well be that he thought he might leave to his wife to make a proper disposition of his property amongst his family. The learned judge has declared her to be a trustee where the will contains no words whatever to create a trust. It is not, in my opinion, necessary that there should be an express declaration of his desire or intention to disinherit his sons if there is an actual gift to some other person expressed in clear and unequivocal words, and I must respectfully dissent from the dictum of Mr. Justice Phear in the unreported case referred to, nor can I agree with Mr. Justice Macpherson in thinking that there is no indication of a desire to disinherit his sons. Allowing that a Hindu is less likely than any other person to disinherit his sons, it still appears to me that his desire and intention to do so may be shown, as in the case of another person, by the disposition he makes of his property.

Upon the construction which I think I must put upon this will, the point taken by the counsel for the respondent, the plaintiff, that the property, being the gift of a husband to his wife, was inalienable, and on her death would descend to the heirs of the husband, does not arise. The husband has given to his wife an absolute power of dis-



stances with his opinion in regard to the propriety of instituting a suit for the establishment of the right of Government."

*Addition to Clause 5, Section 2, Chapter XXVI, page 352, Board's Rules.*

No. 9.

AFTER the words "issue of the notice," Clause 5, Section 2, Chapter XXVI, page 352, Board's Rules, insert the words "in the Government Gazette."

*How searching Fees are to be credited in future.*

No. 10.

As under Financial Resolution No. 669, dated 29th June last, searching fees are no longer credited to imperial revenue, District Officers are requested to exclude them from Table V, heading F of Return No. X, and from the Land Revenue Registers and Cash Accounts, and to credit them in future as miscellaneous receipts in the Provincial Service Day Book.

*How Trees, Houses, &c., standing on land required for public purposes are to be valued.*

No. 11.

As under Section 3, Act X of 1870, trees, houses, and other immovable things standing on land under acquisition for public purposes, are included in the definition of the word "land," the value of such things should always be included in the Collector's estimate of the market value of the land, and the additional compensation under Section 42 of the Act should be paid on the lump sum. When a case is referred to the Civil Court for adjudication, the Collector should, if necessary, move the Court to adopt the form of valuation above specified.

*Areas in Columns 2 to 5, Part I A-1 of Return No. 41B to be given in Acres and Square Miles.*

No. 12.

THE areas in columns 2 to 5 of Part I A-1 of Return No. 41B., should be given in acres as well as square miles.

A. MONEY, Esq., C. B.

*Court Fees Labels to be cancelled at the time they are affixed.*

No. 13.

A QUESTION having been submitted as to the time when the labels used to denote the Court fees on such documents as copies, certificates, &c., which are in the first instance issued by a Court or Collectorate Office, should be cancelled,—i. e. whether they should be cancelled by the Court at the time of issuing the documents, or at the time of filing the same,—it has been ruled by the Government of India, in the Financial Department that the Courts and officers are to cause the labels affixed to documents issued by them and liable to a fee under the Act to be cancelled at the time that they are affixed.

The foregoing ruling is published for the information and guidance of Divisional and District Officers, who are requested to see that the orders of Government are invariably carried out.

*As a temporary measure, allows a Discount of one anna per rupee to Stamp-vendors for sale of Court Fees adhesive Stamps.*

No. 14.

WITH advertence to Circular Order No. 12 of August last, District Officers are informed that Government has sanctioned, as a temporary measure, the payment of discount of one anna per rupee to stamp-vendors for the sale of the paper now to be used for the Court Fees Adhesive Stamps. In letting vendors of stamp paper know this, it should also be explained to them that when the new rules for the sale of Court Fees' Labels through salaried vendors come into force, all unsold paper then in their hands will be taken back at the price paid for it to the Collector.

DECEMBER, 1872.

THE HON'BLE V. H. SCHALCH.

*Prescribes form of re-conveyance of grants of waste land (to be added as Form L at page 365 of Board's Rules.)*

No. 1.

THE following form of re-conveyance of grants of waste land is added as Form L



at page 365 of the Board's Rules, and is to be used when gauts hypothecated for redemption or purchase-money remaining unpaid are fully redeemed—

This Indenture made the      day of 1872 between the within-named Secretary of State for India in Council of the one part, and the within-named

of the other part, witnesseth that, in consideration of the sum of Rs.      to the said Secretary of State for India in Council paid by the said

on or before the execution of these presents in full satisfaction of all principal moneys and interest secured by the Indenture secondly within written and the receipt whereof the said Secretary of State for India in Council doth hereby acknowledge and therefrom acquit and release the said and his heirs, representatives, and assigns.

The said Secretary of State for India in Council doth in virtue of all powers and authorities enabling him in that behalf, and so far as he lawfully can or may by these presents grant and convey unto the said

his heirs, representatives, and assigns all and singular the lands and premises comprised in and granted, or otherwise assured by the said Indenture secondly within written or expressed so to be, to have, and to hold the lands and premises hereby granted or expressed, so to be unto and to the use of the said

his heirs, representatives, and assigns freed and absolutely discharged from all principal moneys and interest secured or intended to be secured by the said Indenture secondly within written and all claims and demands on account thereof, and the said Secretary of State for India in Council doth hereby for himself and his successors covenant with the said

his heirs, representatives, and assigns that he, the said Secretary of State for India in Council, hath not at any time done or executed, or knowingly suffered, or been party or privy to any act, deed, or thing, whereby the lands and premises hereby granted and conveyed or expressed so to be, or any of them, or any part thereof, are, is, can, or may be impeached, charged, or incumbered in title, estate, or otherwise howsoever. In witness whereof the said parties to these presents have hereunto set their hands and seals the day and year first above written.

Signed, sealed, and delivered for and on behalf of the Secretary of State for India in Council, by  
by order of the Lieutenant-Governor of Bengal, in the presence of

*Draws attention to Financial Department Notification exempting from stamp duty unauthenticated copies of settlement records furnished to landholders and cultivators.*

#### No. 2.

THE attention of all Officers in the Revenue Department is invited to the Notification of the Government of India, in the Financial Department, No. 1906, published in the *Gazette of India*, under date the 9th August last, page 764, exempting from stamp duty unauthenticated copies of settlement records furnished to landholders and cultivators.

*Suspends until further orders the submission of Return No. XII regarding settlements; directs that Board's orders be cited in cols. 4 and 5, Table II of Return No. X, &c.*

#### No. 3.

As the power of confirming settlements has been withdrawn from the local officers, and as all settlements and re-settlements are now reported to the Board for confirmation, the submission of Return No. XII to this office is hereby suspended until further orders.

In cases in which entries in columns 4 and 5, Table II of Return No. X, appear in consequence of settlements which have been sanctioned by the Board, the number and date of the Board's orders should be cited in explanation of those entries. When such entries are due to new settlements made in anticipation of sanction, as directed in para 9 of the Settlement Rules, communicated with the Board's endorsement No. 419B of 24th July last, the fact should be stated; when to any other cause, the circumstances should be fully explained.

*Adds further paragraph to Instructions for the acquisition of land for public purposes.*

No. 4.

THE following is added as para. 29A of the Instructions for the acquisition of land for public purposes :—

“As soon as an award has become final, the Collector should give effect to any abatement of revenue which may have been determined on in connection with it, whether any delay does or does not occur in the payment to the parties concerned of that portion of the compensation awarded which is payable in cash.”

*Addition to paragraph 16 of the Instructions under Act X of 1870.*

No. 5.

THE following has been interpolated after the word “law” in line 5 of paragraph 16 of the Instructions under Act X of 1870 :—

“Should the land to be occupied, or any portion of it, belong to, or be in the possession of, Government, the personal notice required by the law should be served on the chief local representative of the department interested.”

*Draws attention to, and modifies, Clause 9A, page 357, Board's Rules, reserving right of Government to demand a royalty from mines on land sold.*

No. 6.

A CASE having recently occurred in which a tract of waste land was sold, without reservation of the right of Government to demand a royalty on any mineral products which might be found on it, whereby actual loss may accrue to the State, the attention of local officers is called to Clause 9A, page 357, Board's Rules, which is hereby modified as follows :—

For the words, in lines 3 and 4, “that which the State may be able to claim in the way of royalty from mines discovered on land which is private property,” substitute “that of the demand of the State to a royalty from any mines on the land so sold.”

THE HON'BLE V. H. SCHALCH AND A. MONEY, Esq., C. B.

*Amount to be refunded from each deposit number, &c., to be stated in all future applications for refund of deposits of more than 3 years' standing.*

No. 7.

DISTRICT Officers are requested to state, in all future applications for the refund of deposits of more than three years' standing, the amount that is to be refunded from each deposit number, and also the amount or balance of the deposit as per Registers.

A. MONEY Esq., C. B.

*Warns Officers to guard against the forgery of adhesive Court Fees' Stamps.*

No. 8.

CERTAIN attempts to forge the adhesive Stamps lately issued for the purpose of denoting Court fees have been recently brought to light, and the Member in charge now calls the earnest attention of all District Officers to the risk of fraud arising from the greater facility with which such Stamps can be forged, in comparison with impressed Stamps.

Large quantities of these adhesive Stamps are daily presented in payment of process fees, and very seldom come under the actual observation of the head of a Revenue Court. Attempts to use forged Stamps are more likely therefore to occur in connection with this mode of using Stamps than with any other. Every head of a Court in which such fees are paid by Stamps is desired, in future, to call for, from time to time, papers which have been so stamped, and to satisfy himself thoroughly by personal examination that the Stamps used in his Court are genuine.

THE HON'BLE V. H. SCHALCH.

*Shows how Interest on current Demands of Rent should appear in Return No. 31.*

No. 9.

IN the preparation of future Returns No. 31, District Officers and Commissioners are

requested to see that interest on current demands of rent,—i. e. on instalments not paid when they fall due, but paid within the year,—is shown in column 2 or 10 (as the case may be) of Table I, and that any difference between columns 10 and 23, which may result from this practice, is explained in the separate explanation sheet.

Similarly, interest on arrears of rent should appear in columns 3 and 11 of Table I, tests 4 and 11 being satisfied by an explanation on the separate sheet.

Interest which may have accrued during the year on debts due to and by the estate should be added to column 3 of Tables III and IV respectively, and, if paid, to the corresponding columns of realization.

—  
A. MONEY, Esq., C. B.

—  
*Draws attention to Government Notification regarding Practice of Post-dating Hoondees.*

No. 10.

THE Board of Revenue has been directed by the Government to draw attention to the

notification by the Financial Department, No. 1264, dated 28th July 1871, in which it was pointed out that the practice of post-dating hoondees or bills, in order to evade payment of stamp duty, was illegal; and that any person making, signing, issuing or (except as provided in Section 26 of the General Stamp Act, 1869) accepting, endorsing, paying or receiving payment of any such post-dated bill, was liable to the penalties provided in Section 29 of the Stamp Act.

2. The Government has reason to believe that the practice of post-dating hoondees still continues, and that a considerable amount of revenue is in this way lost. District Officers are, therefore, instructed to watch carefully against any such practice, and to institute prosecutions in all cases in which convictions can be obtained under Section 29 of the General Stamp Act.

—

## MISCELLANEOUS.

### (RESOLUTION.) JUDICIAL DEPARTMENT.

#### JUDICIAL.

*Calcutta, the 1st January 1873.*

READ—

The replies of Commissioners to Judicial Circular No. 34, dated 1st July, and reminders.

1. The Lieutenant-Governor has considered the reports of Commissioners and district officers on the powers to be conferred on the officers serving under them and on others under the new Code of Criminal Procedure, and directs special attention to the *Calcutta Gazette* of this day's date, in which are set out the powers which each officer and Honorary Magistrate will exercise. If the name of any officer has been omitted, he will continue to exercise his present powers until further orders, but the fact should be at once reported.

2. It will be seen that the Lieutenant-Governor has nowhere conferred upon any officer powers which the Magistrate of the district can legally bestow, but he has generally vested the senior officers at head-quarter stations under the Magistrate of the district with powers under sections 142, 157, 417, and 521. The power of taking cognizance without complaint of offences suspected to have been committed (section 142) is given to senior officers to be exercised in case of the Magistrate's absence, but should only be used under his special instructions as to who is to use it and who not. Where, as in the 24-Pergunnahs, more than one Magistrate at the same place has this power, the Magistrate of the district should direct which (if any) may exercise it, and the others are not to do so. It will still rest with the Magistrate of the district to confer powers if he chooses under section 141 and other sections. Powers under sections 44 and 266 will only be conferred on special applications for special reason shown. The Lieutenant-Governor has deliberately not

given power under section 44 of transferring cases taken up on complaint, because he thinks there has been hitherto far too great disposition to hand parties about from one officer to another. No doubt it is well that complaints should be looked into by competent officers before they are entertained; but on the other hand His Honor is much inclined to think that when all the petitions are taken by one officer he does not sift them properly; and it seems to him that when a complaint is taken by one officer and handed over to another and another, the responsibility for due sifting in the first instance is lost, and cannot be fixed. For the present, then, he thinks it is better that Magistrates of districts should exercise the power of determining what classes of cases each officer may hear within certain local limits, and let these officers take the petitions themselves. The District Magistrates can reserve to themselves any classes of complaints and receive and distribute them. There are some classes of cases, such as defamation, that most Magistrates should not be allowed to entertain. In special cases, if the work thus falling on the District Magistrates is found heavy, or there is special reason for it, the Lieutenant-Governor may give powers under section 44 to one officer at the head-quarter station, but anything of the kind must be exceptional, the necessity being shown after a reasonable distribution of the power of receiving petitions. The Lieutenant-Governor wishes to try this last system for a time, and after sufficient experience if any grave disadvantages are found to attend it, representation may be made. Meantime he expects the superior Magistrates narrowly to scrutinize the proceedings of their subordinates, to look over their registers, and to see what they are about.

3. Under the distribution of work above suggested, it would be most desirable that the proposition several times made should be carried out, viz., that at large stations one court should sit regularly as the police court, and take up at once ordinary police

cases as they are sent in by the police. It seems wholly unnecessary that the work should be distributed in dribblets, a little to every man who has powers of a Magistrate, as is now too often the case; it is not necessary to employ all the Magistrates at all times on criminal work. It is better that certain officers should be adequately employed, and the others set free for other work. The Lieutenant-Governor desires that a statement of the distribution of work made may be sent in from each district through the Commissioner; and that it may be stated which is the police court for the whole or any part of the head-quarter divisions with or without exception of any class of cases.

4. It is the wish of the Lieutenant-Governor that Magistrates of districts should themselves dispose of all criminal appeals from the decisions of second and third class Magistrates. It is most important that they should in this way learn to know their subordinates and the results of their criminal administration. Criminal appeals do not generally involve the taking of evidence or very prolonged labour, and a district Magistrate may well dispose of them. Any applications to confer appellate powers under section 266 on any other Magistrate must therefore be very exceptional and very specially supported.

5. The Lieutenant-Governor has not generally thought it desirable to place any other officer than the District Magistrate himself in complete charge of the head-quarter division, but almost all the powers of a sub-divisional officer have been or may be delegated to a senior officer under the Magistrate. The only powers which cannot be so delegated to any other than a sub-divisional officer are those under section 46 (power to pass sentence on proceedings recorded by a subordinate Magistrate) and under section 47 power to withdraw cases; and the Lieutenant-Governor does not know that it is indispensable to give these powers in any case.

6. The Lieutenant-Governor has conferred the powers of summary trial under section 222 very freely in the neighbourhood of Calcutta, where the working of the system will be open to the control of public opinion and under easy supervision. He has also in many cases given these powers to one senior officer in each station besides the District Magistrate, and occasionally to good sub-divisional officers, European and Native,

who already exercise first class powers, and whose position, experience, and character, fit them to be so treated. Magistrates of districts will give special attention to the working of this provision of the law.

7. The Lieutenant-Governor is much disappointed to find that several Commissioners and a good many Magistrates have taken very little trouble during the past six months to master the principles of the Code in respect of benches, and to consider how to apply these in their several jurisdictions. Wherever a Commissioner has made any definite proposals, the Lieutenant-Governor has given powers to all the non-official gentlemen named in each district as Honorary Magistrates, and has directed by a notification of this day's date that benches should be formed in the manner there indicated. The way in which the bench system might conveniently be worked may be gathered both from the notification and from the accompanying copy of draft rules under section 52, and His Honor trusts that no time will be lost in the submission of proposals for introducing the system in every district where there are non-official gentlemen of respectable position willing to take part in the administration of justice. Benches for the disposal of municipal work and conservancy cases might very well be introduced in many towns, and the Lieutenant-Governor hopes that the Magistrates will submit proposals to this end without any unnecessary delay.

The rules now forwarded may be adopted with such modifications as local circumstances may necessitate; but a copy of each set of rules proposed must be submitted for the final approval of Government.

8. The Magistrates will, it is hoped, in most instances, be able, from their existing establishments, to spare a clerk or writer for the use of each bench on its days of sitting. Ordinarily the record and judgment should, if possible, be drawn up by the chairman or presiding officer, the briefness of the form in summary cases making this a task of little labor. If any arrangements are needed in any case under section 230 for a court officer, a report must be made and sanction asked for. Arrangements must also be made for the issue of summons, &c., in cases to be heard by benches. The Superintendent of Stationary will be directed to prepare at once registers under section 237.

9. The Lieutenant-Governor is particularly obliged to Mr. S. C. Bayley, the Commissioner of Patna, who has taken special interest in this question of benches, and proposes to introduce freely the scheme of disposing of cases locally, by directing sub-divisional officers or other salaried Magistrates to ride out and sit periodically with the local Honorary Magistrates for the trial of cases within the competence of a Bench so constituted. His Honor would be glad to see this plan tried in other divisions. For the present the Lieutenant-Governor has confined the action of benches in rural places to sittings in which a salaried Magistrate takes part, but provision has been made for the hearing of municipal and conservancy cases and other petty cases by Honorary Magistrates sitting alone in towns, and the Lieutenant-Governor will be prepared to receive propositions for the constitution of such benches in rural districts also, if it is found possible to do so.

10. The Lieutenant-Governor regrets that it should be necessary again to urge upon officers the careful study of the provisions of the Code; but from the proposals received from many districts, it is evident that some of its most salient features have not been grasped. It should not be left for Government to point out that the Magistrate of the district has, as such, both powers of summary trial and authority to regulate in the most particular way the work of his subordinates. His Honor trusts that all officers will strive to make themselves familiar with the Code of Criminal Procedure.

11. All the Honorary Magistrates now shown in the Civil List have been entered in the schedule; but it is believed that several of them may be dead or have left the country. Commissioners are requested to report at once what changes in the List are necessary from these causes.

12. It is desirable that all salaried Magistrates who are fit for second class powers should be vested with them. Inquiries on the subject are being made; the result of pending examination will also be soon known, and a revised List will be shortly published. Any recommendations for alteration of powers or addition to the List or other variation should therefore be made by District Magistrates and Commissioners as soon as possible.

#### *Draft Rules for Benches of Magistrates.*

1. The Bench shall try such cases as its powers enable it to try, and it is authorized to try within the local limits following, or such particular cases as are made over to it by the Magistrate of the district or any Magistrate empowered to make over cases. It can only entertain of its own motion such complaints as the Magistrate of the district may authorize it to entertain both in respect of local limit and classes of cases.

#### *[ Here enter Local Limits. ]*

The Magistrate of the district or division may empower any single member of a Bench or any salaried Magistrates to receive complaints of cases triable by the Bench, and to issue the necessary processes for bringing the accused and the witnesses before the Bench at its regular sittings.

2. The Bench shall sit at the place and on the dates mentioned below. The Honorary Magistrates will sit in the rotation arranged by the Magistrate of the district or division, but any Magistrate not named may sit, unless the Magistrate of the district or division otherwise directs.

#### *[ Here enter place and ordinary dates of sitting. ]*

3. The Bench may hold one or more adjourned sittings if this be found necessary for the disposal of business or of part-heard cases; but it shall be open to the Bench at the close of its regular sitting either to refer unheard cases back to the Magistrate under whose order of reference they received them, or to postpone them to next Bench day, as may seem most convenient.

4. The Chairman of the Bench for the time being shall be the Magistrate of highest powers present at a sitting. Where all present are of equal powers, the Bench may elect its own Chairman, provided always that it shall be in the direction of the Magistrate of the district to appoint the Chairman for each time of sitting or generally.

5. The Chairman shall conduct the proceedings of the court and exercise all the functions in that behalf usually exercised by a Magistrate when sitting alone. He shall decide upon the admissibility of evidence and maintain order in the court; but it shall be open to any member of the Bench to put any question to the witnesses, either direct or through the Chairman as the latter may

deem advisable, and to suggest any matter for the Chairman's consideration.

6. Each member of the Bench shall have a voice in the finding and sentence. In a Bench of three or other uneven numbers the opinion of the majority shall prevail. When the numbers are even, the Chairman shall have a casting vote.

7. Any recording of evidence or other function exercisable by the Chairman may, with his consent, be exercised by any one of his colleagues.

8. Any part-heard case postponed to a further sitting of the Bench may be proceeded with if any member of the Bench has been present at the previous hearing in the case, but subject to the provisions of section 328 of the Code.

9. The Bench may refer any point of law for the opinion of the Magistrate of the district or division, or of any first-class Magistrate appointed by the Magistrate of the district for that purpose, and the Magistrate may certify his opinion thereon.

10. When any person is convicted by the casting vote of the Chairman, the Chairman shall then and there ask him if he wishes to appeal, and if he desires to do, shall forthwith record his appeal in brief and forward the case to the Magistrate, intimating to the person convicted that he may file any grounds of appeal he pleases.

### NOTIFICATION.

*Calcutta, the 1st January 1873.*

1. Under the provisions of Act X of 1872 (the Criminal Procedure Code), the Lieutenant-Governor is pleased to direct that the officers and others whose names appear in the schedule below, shall, in each case, exercise the powers shown opposite their names in the districts shown in the schedule.

2. Magistrates of districts are generally empowered, under section 49, to authorize any of their subordinate Magistrates to entertain complaints within their competence arising within certain local limits, and from time to time to vary such orders.

3. Under section 48, the Lieutenant-Governor is pleased to authorize all Magistrates of districts to withdraw from any of their subordinate Magistrates such classes of cases as they may think proper so to withdraw.

4. Under section 36, the Deputy Commissioners of the districts named on the margin are vested with the special powers described in that section.

The officers in charge of the Garo Hills, Khasi and Jynteah Hills, Naga Hills, and the Hill Tracts of Chittagong will continue to exercise the powers vested in them by the special rules and orders of Government regarding those districts.

5. Under section 143, the Lieutenant-Governor is pleased to vest all Magistrates of the second class with power to commit any person to the Court of Session for any offence triable by such court.

6. In each of the districts named on the margin, any two or more of the Honorary Magistrates shown in the schedule below as attached to that district, may sit together as a bench, in company with the Magistrate of the district, or any salaried Magistrate subordinate to the Magistrate of the district exercising not less than second class powers, whom the Magistrate of the district may depute for that purpose; and the benches so constituted are hereby severally vested with powers of a first class Magistrate in respect of offences cognizable by Magistrates of that class, and powers of summary trial under section 224 of the Code in respect of all the offences described in section 222.

7. Any one of the Honorary Magistrates named in the schedule may, under the orders of the Magistrate of the district, sit together with any salaried subordinate Magistrate exercising not less than second class powers to form a bench, and the bench shall, when so constituted, exercise second class powers in respect of offences cognizable by Magistrates of that class, and powers of summary trial under section 225 in respect of all the offences set out in that section.

8. Benches exercising first and second class powers, as above, shall sit in such places, and try such classes of cases, and within such limits, as the Magistrate of the district may direct, or such particular cases as may be referred to them by an officer empowered to refer cases.

Darjeeling.	Maunbhook.
Julpigori.	Gopalpara.
Cachar.	Kamroop.
Sonthal Pergun-	Durrung.
nahs.	Nowgong.
Hazareebaugh.	Seebagor.
Lohardugga.	Luckimpore.
Singbhook.	

Dinagapore.	Backergunge.
Maldah.	Mymensing.
Bungpore.	Shahabad.
Chittagong.	Sarun.
Tippurah.	Tirhoot.
Dacca.	Kamroop.



9. In any town within the districts referred to in paragraph 6 above, where there is a municipality, the Lieutenant-Governor is pleased to order that, subject to the general direction of the Magistrate of the district or division, any two or more of the Honorary Magistrates shown in the district schedule may sit together as a bench for the disposal of municipal and conservancy cases without the assistance of any salaried Magistrate; and such a bench shall exercise, in respect of all such cases which they are empowered by the Magistrate of the district to take up, or which are referred to them, third class powers, and shall also exercise powers of summary trial under section 225, in respect of any offences against Municipal Acts and the conservancy clauses of Police Acts

and other offences specified in section 225. Such Municipal benches are hereby also vested with powers under sections 141, 518, and 519 of the Code.

10. Under section 88 the following jails are appointed to be places in which European British subjects may be confined:—

Presidency Jail.	Dacca Jail.
Hazareebaugh	Darjeeling "
Penitentiary.	Chittagong "
Bhaugulpore Jail.	Cuttack "
Midnapore	Tezpoore "
Rajshahye	Patna "
Cachar	Dinapore lock-up.

A. MACKENZIE,

*Offg. Secy. to the Govt. of Bengal.*

## SCHEDULE OF MAGISTRATES AND THEIR POWERS.

### BURDWAN DIVISION.

#### *Burdwan District.*

Names of Magistrates.	Powers with which vested.
Mr. E. H. Ruddock, c.s.	... 1st class, and powers under sections 142, 157, 417, and 521.
„ R. T. Sevestre ...	... 2nd class.
Baboo Gopal Chunder Sen	... 2nd „
„ Bogolanund Mookerjea	... 2nd „
„ Kedarnath Das ..	... 2nd „
„ Hitlall Misser ...	... 2nd „ (Honorary).
Mr. H. G. Sharp, c.s. ...	... Charge of RaneeGUNGE division, with 1st class powers and powers under section 222.
Baboo Ramcoomar Bose	... Charge of Culna division, with 2nd class powers.
„ Protap Narain Sing	... Charge of Bood-Bood division, with 2nd class powers.
„ Nobin Krishna Sircar	... Charge of Jehanabad division, with 2nd class powers.
„ Joggessur Mookerjea, M.A. & B.L.	... Charge of Cutwa sub-division, with 2nd class powers.

#### *Bancoorah District.*

Baboo Kanti Chunder Chatterjea	... 1st class.
„ Rutton Lall Ghose	... 2nd „
Mr. A. H. Haggard, c.s.	... 3rd „
Mr. J. M. G. Cheke	... } 3rd „ (Honorary).
Baboo Damoodar Sing	... }
„ Hiralal Sing	... }

#### *Beerbhoom District.*

Baboo Tarini Kumar Ghose, B. A.	... 2nd class
„ Janoki Nath Mojomondar	... 3rd „
Mr. H. Rait	... } 3rd „ (Honorary).
„ H. C. Erskine	... }
Baboo Dwarkanath Roy	... }

Names of Magistrates.	<i>Hooghly District.</i>	Powers with which vested.
Mr. W. R. Larminie, c.s.	...	1st class, and powers under sections 142, 157, 222, 417, and 521.
„ W. F. Meres, c.s.	...	1st class, and powers under sections 142, 157, 222, 417, and 521.
„ W. R. Pogson	...	2nd class.
Baboo Shama Churn Chatterjea	...	2nd „
„ Rungolal Banerjea	...	2nd „
„ Brohmonath Sen	...	2nd „
„ Romesh Chunder Mookerjea	...	2nd „
„ Govind Chunder Bose	...	2nd „
Mr. F. R. C. Collier, c.s.	...	3rd „
„ J. Boxwell, c.s.	...	Charge of Serampore division, with 1st class powers and powers under section 222.
„ E. B. Godfrey	...	2nd class.
„ E. R. Middleton	...	2nd „
Dr. George Smith	...	2nd „
Mr. C. S. Turnbull	...	3rd „ } (Honorary.)

*Howrah District.*

Mr. J. A. Ricketts	...	1st class, and powers under section 222.
Baboo Dwarkanath Dey	...	1st „
„ Gourdas Bysack	...	2nd „

*Midnapore District.*

Mr. W. B. Oldham, c.s.	...	1st class, and powers under sections 142, 157, 222, 417, and 521.
Baboo Kaliprosunno Roy Chowdhry	...	1st class.
„ Ramakhoy Chatterjea	...	2nd „
Mr. F. F. Handley, c.s.	...	3rd „
Baboo Mohendro Nath Gupta	...	3rd „
„ Bejoy Kissen Bose	...	3rd „
Mr. H. W. Barber	...	Charge of Contai division, with 1st class powers.
Baboo Tarini Churn Mitter	...	Charge of Tumlook division, with 1st class powers.
„ Jadoonath Bose, B.A.	...	Charge of Gurbetta division, with 2nd class powers.
Mr. W. Terry	...	} 3rd class (Honorary).
„ J. A. Clarke	...	

## PRESIDENCY DIVISION.

*24-Pergunnahs District.*

Mr. R. D. Hime, c.s.	...	1st class, and powers under sections 142, 157, 222, 417, and 521.
„ T. W. Gribble, c.s.	...	1st class, and powers under sections 142, 157, 222, 417, and 521.
„ W. H. Verne, c.s.	...	1st class, and powers under sections 142, 157, 222, 417, and 521.
Moulvie Abdool Lutif	...	1st class, and powers under sections 142, 157, 222, 417, and 521.
Mr. W. H. Ryland	...	1st class, and powers under sections 142, 157, 222, 417, and 521.
Kumar Harendra Krishna	...	1st class, and powers under sections 142, 157, 417, and 521.
Mr. A. D'B. Gomes	...	1st class.
Baboo Hem Chunder Kerr	...	1st class.
„ Kali Churn Ghose	...	1st class.

Names of Magistrates.	Powers with which vested.
Colonel W. L. L. Randall ...	1st class (within the precincts of the residence of the King of Oudh).
Mr. W. Heysham ...	2nd class.
Baboo Rakhal Das Mookerjee ...	2nd class.
Mr. C. R. Marindin, c.s. ...	3rd class.
„ G. E. Porter, c.s. ...	Charge of Baraset division, with 1st class powers and powers under section 222.
„ J. E. B. Jeffrey, c.s. ..	Charge of Diamond Harbour division, with 1st class powers and powers under section 222.
Baboo Isser Chunder Mitter. ...	Charge of Busseerhat division, with 1st class powers and powers under section 222.
„ Mohima Chunder Pal ...	Charge of Bariopore division, with 2nd class powers.
„ Bejoy Madhub Mookerjee ...	Charge of Satkhira division, with 2nd class powers.
Capt. A. H. Eckford ...	Charge of Barrackpore division, with 1st class powers and powers under section 222.
Lieut.-Col. A. Elderton ...	Charge of Dum-Dum division, with 2nd class powers.
Mr. R. C. Sterndale ...	1st class
Nawab Asghur Ali Khan, c.s.i. ...	2nd „
Munshi Amir Ali, Khan Bahadoor ...	3rd „
Raja Satyanund Ghosal ...	3rd „
<i>Jessore District.</i>	
Mr. F. H. McLaughlin, c.s. ...	1st class, and powers under sections 142, 157, 417, and 521.
Baboo Anundo Mohun Mojoomdar ...	1st class, and powers under sections 142, 157, 222, 417, and 521.
„ Rashbehary Bose ...	1st class.
„ Ram Sunker Sen ...	1st „
„ Uma Churn Gangooly ...	2nd „
Mr. C. J. O'Donnell, c.s. ...	3rd „
Baboo Mohini Mohun Chuckerbutty ...	3rd „
Mr. R. M. Waller, c.s. ...	Charge of Jenidah division, with 1st class powers and powers under section 222.
„ J. Kelleher, c.s. ...	Charge of Narail division, with 1st class powers and powers under section 222.
Baboo Chunder Narain Sing ...	Charge of Khoolnah division, with 2nd class powers.
„ Kedarnath Mullick ...	Charge of Magoorah division, with 2nd class powers.
„ Ram Churn Bose ...	Charge of Bagirhat division, with 2nd class powers.
<i>Nuddea District.</i>	
Mr. P. D. Dickens, c. s. ...	1st class, and powers under sections 142, 157, 222, 417, and 521.
Baboo Doorga Dass Chowdry ...	2nd class.
„ Kaliprosunno Sircar ...	2nd „
„ Lolit Mohun Chatterjee ...	2nd „
Mr. H. L. St. Barbe ...	3rd „
„ A. A. Wace, c. s. ...	Charge of Meherpore division, with 1st class powers and powers under section 222.
„ L. C. Abbott, c. s. ...	Charge of Kooshtea division, with 1st class powers and powers under section 222.
Moulvie Faqucer Ahmed ...	3rd class.
Baboo Dinonath Addy ...	Charge of Ranaghat division, with 1st class powers and powers under section 222.

<i>Names of Magistrates.</i>	<i>Powers with which vested.</i>
Baboo Srish Chunder Vidaratna ..	Charge of Bongong division, with 1st class powers and powers under section 222.
Mr. J. F. Needham ...	Charge of Choondanga sub-division, with 2nd class powers.

**RAJSHAHYE DIVISION.**

*Moorshedabad District.*

Mr. J. P. Grant, c. s. ...	1st class, and powers under sections 142, 157, 222 417, and 521.
Baboo Bunkim Chunder Chatterjea	1st class.
" Gooroo Churn Dass ...	1st "
" Taraprasad Chatterjea ...	2nd "
" Hurri Churn Ghose ...	2nd "
" Shiva Prasad Sandyal ...	2nd "
Mr. J. O. Williamson ...	2nd "
" C. W. Bolton, c. s. ...	3rd "
" C. J. Hampton ...	Charge of Rampore Haut division, with 1st class powers.
" T. J. Murray, c. s. ...	Charge of City division, with 2nd class powers.
" R. C. Dutt, c. s. ...	Charge of Jungypore division, with 2nd class powers.

*Dinagapore District.*

Mr. A. C. Brett, c. s. ...	1st class, and powers under sections 142, 157, 222, 417, and 521.
" G. H. Damant, c. s. ...	1st class.
Moulvie Fyzoollah ...	2nd "
Baboo Bemolanund Mookerjea ...	2nd "
Mr. M. Finucane, c. s. ...	3rd "
Baboo Khetro Mohun Sing ...	} 3rd " (Honorary).
" Radha Gobind Roy Saheb ...	
Moulvie Mozohur Hossein Chowdry ...	
Mr. T. W. Tweedie ...	
Baboo Hara Chunder Chuckerbutty	

*Maldah District.*

Baboo Sitakant Mookerjea ...	2nd class.
Mahomed Kamil ...	2nd "
Baboo Nil Chunder Chuckerbutty ..	3rd "
" Poresnath Chowdry ...	} 3rd " (Honorary).
" Anunto Nath Dass ...	
" Gohair Mohendro Geer ...	
" Baboo Dwarkanath Chatterjea	

*Rajshahye District.*

Mr. J. Ward, c. s. ...	1st class, and powers under sections 142, 157, 222, 417, and 521.
Baboo Mohendro Nath Bose ...	1st class.
Mr. R. L. Perry ...	2nd "
Baboo Hurri Nath Chatterjee ...	2nd "
Mr. F. H. B. Skrine, c. s. ...	2nd "
Baboo Kassi Kinker Sen ...	2nd "
" Bhobuneshwar Sing ...	Charge of Nattore division, with 2nd class powers.

*Rungpore District.*

E. G. Glazier, c. s. ...	1st class, and powers under sections 142, 157, 222, 417, and 521.
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# THE LAW OBSERVER.

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[No. 3.]

*Selections from the Records of the Government of India.—Minute by the Hon'ble FitzJames Stephen on the Administration of Justice in British India, 1872.*

THIS is certainly a most valuable document. It embodies, upon the subject of judicial administration, not only the views and opinions of Mr. Stephen, but those of almost all the distinguished officers of Government. Really, the paper contains a most useful mass of information which Mr. Stephen has turned into very good account. He has divided the subject into six chapters,—subdivided into several minor heads. He ascertains, first of all, the existing judicial strength of the country and then proceeds to answer certain questions which he proposes to himself for the proper elucidation of his subject.

The existing judicial organization of Bengal is indicated by the following figures:—

1. Judges of the High Court ... 12
2. Civil and Sessions Judges ... 26
3. Additional Judges ... 4

These officers exercise purely judicial functions, both civil and criminal. Besides these there are

4. Collector Magistrates ... 36
5. Joint Magistrates ... 33
6. Assistant Magistrates ... 103
7. Deputy Magistrates ... 196

These officers exercise both judicial and executive functions, and their judicial functions are exclusively criminal. Then we have again

8. Subordinate Judges and  
Judges of Small Cause  
Courts ... 41
9. Munsiffs ... 187

These officers perform duties of an entirely judicial character in civil cases.

Thus, in Bengal, the connection of judicial and executive functions is confined to the several grades of Magistrates.

In the Regulation Districts of the North Western Provinces a similar organization obtains:—

1. Judges of the High Court ... 4
2. Civil and Sessions Judges ... 19
3. Magistrates ... 27
4. Joint Magistrates ... 37
5. Assistant Magistrates ... 62
6. Deputy Magistrates ... 60
7. Judges of the Small Cause  
Courts and Subordinate  
Judges ... 20
8. Munsiffs ... 68

In Madras the organization is as follows:—

1. Judges of the High Court ... 4
2. Civil and Sessions Judges ... 21
- These have entirely judicial functions.
3. Magistrates ... 19
4. Joint Magistrates ... 12
5. Assistants ... 87
6. Deputy Magistrates ... 49

The functions of these officers are both judicial and executive, their judicial duties being however entirely of a criminal nature.

7. Judges of Small Cause Courts 11
8. Principal Sudder Amceens ... 12
9. Munsiffs ... 110

These officers perform duties of a civil and judicial nature. At the Neilgherries, there are besides, a Commissioner and an Assistant Commissioner who unite the executive functions and the criminal powers of a magistrate and a subordinate magistrate respectively. In Bombay the judicial officers are

1. Judges of the High Court ... 8
2. { Judicial Commissioner ... 1  
Civil and Sessions Judges ... 11
3. Assistant Judges in three  
grades ... 12
4. Magistrates ... 16

5. Assistant Magistrates	...	35
6. Deputy Magistrates	..	24
7. Extra Assistants	...	10
8. Principal Sudder Ameen	..	11
9. Munsiffs	..	70

The first three classes exercise purely judicial functions. The next four classes have judicial and executive duties to perform, their judicial jurisdiction being wholly criminal. The 8th and 9th classes exercise exclusively civil judicial functions.

In the Non-Regulation Provinces the executive and judicial functions are united in every grade of the service. The judicial Commissioner exercises the powers of a Civil and Sessions Judge. The Deputy Commissioner is a Magistrate with full powers. The Assistant Commissioner is a Subordinate Judge and Magistrate. In the Punjab, the Judges of the Chief Court and the Small Cause Courts have purely judicial functions and the only officers whose functions are purely executive are those immediately attached to the Local Government and the settlement officers. Even the Financial Commissioner exercises quasi-judicial functions in certain cases.

It will be seen from the above statement that most of the officers of Government unite in their persons executive with judicial functions. The question then arises whether it is not desirable to separate these functions. Mr. Fitz-James Stephen answers the question in the affirmative, his objections to the existing system being principally twofold :

(1) "It weakens the executive administration by practically giving the judicial administration greater prominence in the minds of the district officers and converting them into lawyers.

(2) The conditions under which the two kinds of work have to be done are such that it must be had economy of time to unite them in the same person. Judicial work is in-door work, which ought to be done at stated times, punctually observed; executive work is, in many cases, out-door work which to be done well must be done at all sorts of

times as circumstances may require. It is obvious that a man who has to do both, must either be unpunctual as a judge, or inefficient as an executive officer. Moreover, his double character furnishes an idle man, or a man who dislikes either branch of his work, with a ready excuse for inefficiency. He can always answer any complaints made by his judicial or executive superior, as the case may be, by saying that the conduct complained of arose from an undue stress of executive or judicial work."

Mr. Stephen, however, considers that in some parts of India, "the union of all powers in one hand may be advisable, partly because a primitive people like a single ruler, and partly because the whole amount of work to be done is so inconsiderable that it would be wasteful to employ more than a single officer upon it." Such cases, however, are exceptional, but as a rule, Mr. Stephen thinks that "the complete amalgamation through every grade of the services of the judicial and executive functions is inconsistent with the proper administration of a regular system of law, and specially of the Codes of Civil and Criminal Procedure."

These, certainly, are very sound observations, and we do not think that any one who has carefully thought upon the subject can arrive at any other conclusion.

Then, as to the desirability of establishing a distinct judicial service in the Regulation Provinces, the Government of Bengal invited the opinions of several officers on the subject, and with two exceptions they all appeared to be in favor of the change.

Mr. Bell says :

"I think the judicial branch of the service requires strengthening, because, in the districts near Calcutta, the native bar has so greatly improved that, unless a judge has devoted some time to legal studies, he is not capable of holding his ground against the advocates that surround him. This is a very serious and not a very creditable state of things."

Mr. Cockerell remarks :

"We seem to be in danger of arriving at a state of things which must be prejudicial to the respect which the administration of justice in our Civil and Criminal Courts should command; viz., the spectacle of a Moffusil Bar in advance of the Bench, in experience of the requirements of the law, and a practical knowledge and understanding of the application of its principles.

\* \* \* \* \*

Whilst the class, from which the judges of the principal courts are taken, have even less opportunity than formerly of acquiring experience of judicial duties, and practical knowledge of the application of the law in judicial proceedings, the officers who preside over the Subordinate Civil Courts are, as a rule, very much in advance of their predecessors in knowledge of law and intelligence and discrimination in the application of its principles, which they bring to bear on the adjudication of suits.

And now that the position and prospects of the subordinate judicial service are much improved, and its members are recruited almost exclusively from a class who have attained some proficiency in the study of the law, this superiority is likely to become more and more noticeable."

Mr. Monro observes :

"There can be little doubt that the present training of our officers, both executively and judicially considered, is most imperfect and defective. It consists of a system of learning and unlearning which has an injurious effect on both branches of the service. An Assistant, after passing an examination in civil law at home, comes out to India, and, on his being posted to a district, finds that he has no chance of making any use of his knowledge of civil law until he becomes a judge after fifteen years' service. He then begins to undergo a course of executive training which lasts for a year or two. This period passed, he finds himself at a subdivision and expected to exercise both judicial powers and perform executive duties. His next step of promotion is to that of Joint-Magistrate of

a district, where he at once becomes a purely judicial officer, his executive knowledge being kept latent and held in reserve till his advancement to the charge of a district, when the executive experience of the sub-division is called into play again, and the Magistrate and Collector is expected to control, executively, a large part of country, both as an executive and a fiscal officer, and at the same time fit himself by practice in criminal trials and revenue appeals, for an efficient performance of the functions of a Judge."

This evidence, according to Mr. Stephen, establishes three propositions :

1st. "That the Magistrates are greatly embarrassed by the union in their persons of judicial and executive functions.

2nd. "That the earlier stages of judicial employment do not fit men for appointments as Sessions and Civil Judges.

3rd. "That there is some danger that the regular legal education now given to Subordinate Native Judges and Pleaders may cause their efficiency to contrast unfavorably with the inefficiency of European Sessions Judges."

We pass over a mass of evidence derived from officers in Madras, Bombay and the North Western Provinces, bearing more or less upon the subject.

From a consideration of all the papers before him, Mr. Stephen thinks that such a system of judicial administration ought to be organized as may be consistent with the maintenance of British power in India. With this object in view, he believes that, whatever the system which may be set on foot in this country, it must necessarily fall short of the standard to which Englishmen are accustomed to refer, namely, the administration of justice in England.

According to Mr. Stephen the conditions under which justice must be administered in India are the following :

1. "It must, as long as it lasts, be a system administered by foreigners cast in a mould singularly different from that in which their subjects are cast.



2. "Justice must always be administered in a foreign language, and by men who have to learn by long observation and experience those elementary facts about the habits and the feelings of the people, which Native Judges would have learned from infancy by all the common intercourse of life.

3. "Justice must, for a great length of time, be administered without the two great popular checks to which we are so much accustomed in England, of the Bar and the Press.

4. "Till some change in the national character takes place, justice must be administered amongst people to whom every form of falsehood is familiar, and who appear (as I am informed) to regard falsehood in a European Court as absolutely no crime or sin at all. In other words, the judges must in most cases guess at the truth."

There is, to be sure, some truth in the first two of these propositions, but, we think, the defect adverted to may be remedied by a suitable admixture of the native element on the Bench. With regard to the absence of what may properly be called the Bar sufficiently qualified to exercise a salutary control over the judicial authorities of the country, we think that the evidence of Mr. Bell and others as reproduced in the minute before us relative to the increased efficiency of the Native Bar is conclusive upon the point, and it rests only with the authorities that be to define the status of the Mofussil Vakeels and to make them as independent of the Huzoors with whom they may come in contact as may be consistent with the dignity of the Bench. A healthy public opinion has certainly grown up amongst the natives, but Englishmen in office who do not mix freely with them are not amenable to it. The native press is therefore powerless for good or evil, and must continue to be so, as long as the "Incarnations of justice" can afford to laugh with impunity at the attempts it makes to teach them their duty.

We do not exactly understand why Mr. Stephen should brand the natives,

as a "people to whom every form of falsehood is familiar and who appear to regard falsehood in a European court as absolutely no crime or sin at all." There is nothing peculiar in the climate of India to make the people more prone to tell lies than any other people in the world. Men are men—human nature is the same every where.

It has recently grown into a fashion with a certain class of Europeans in this country to cry the natives down as a set of villains, disaffected towards the Government, and that therefore they should be ruled with a high hand and that no consideration of any kind ought to be shewn to them. What the data for this opinion are, we are not aware, but the fact, however, is certain that unless these benevolent gentlemen, commonly called interlopers, succeeded somehow or other, by hook or crook, in creating a bad feeling towards the natives in the minds of the authorities, there was not the slightest chance of their being allowed to carry on their arbitrary proceedings with impunity. That the present generation of Government officials have been more or less tinctured by this opinion must be evident to those who have had any opportunities of marking their demeanour towards the unfortunate people of the country. We are almost sure that Mr. Stephen drew his inspiration from these gentlemen, for it could not for a moment be believed, that if he had mixed freely with the natives, and exercised his independent judgment in forming an opinion for himself, he would have arrived at the same conclusion. So far as we are aware, Mr. Stephen's residence in the country was very short, and from the slight opportunities he had of indulging in free intercourse with the natives, it must be presumed that if he expressed any opinion in respect of them, such opinion was second-hand at best and derived from a source which was far from friendly towards them or even otherwise disinterested. Such opinion, therefore, is, we fear, not entitled to much weight.

*Of Criminal Force and Assault.*

352	Assault or use of criminal force otherwise than on grave provocation.	Shall not arrest without warrant.	Summons	...	Bailable	...	Imprisonment of either description for 3 months, or fine of 500 rupees, or both.	Any Magistrate.
353	Assault or use of criminal force to deter a public servant from discharge of his duty.	May arrest without warrant.	Warrant	...	Ditto	...	Imprisonment of either description for 2 years, or fine, or both.	Magistrate of the 1st or 2nd class.
354	Assault or use of criminal force to a woman with intent to outrage her modesty.	Ditto	...	...	Ditto	...	Ditto	Ditto.
355	Assault or criminal force with intent to dishonor a person otherwise than on grave and sudden provocation.	Shall not arrest without warrant.	Summons	...	Ditto	...	Ditto	Ditto.
356	Assault or criminal force in attempt to commit theft or property worn or carried by a person.	May arrest without warrant.	Warrant	...	Not bailable	...	Ditto	Any Magistrate.
357	Assault or use of criminal force in attempt wrongfully to confine a person.	Ditto	...	...	Bailable	...	Imprisonment of either description for 1 year, or fine of 1,000 rupees, or both.	Ditto.
358	Assault or use of criminal force on grave and sudden provocation.	Shall not arrest without warrant.	Summons	...	Ditto	...	Simple imprisonment for 1 month, or fine of 200 rupees or both.	Ditto.

## CHAPTER XVI.—OFFENCES AFFECTING THE HUMAN BODY—Continued.

*Of Kidnapping, Forcible Abduction, Slavery, and forced Labour.*

1 Section	2 OFFENCE.	3 Whether the Police may arrest with- out warrant or not.	4 Whether a warrant or a summons shall ordinarily issue in the first instance.	5 Whether bail- able or not.	6 Punishment under the Indian Penal Code.	7 By what Court triable.
363	Kidnapping	...	Warrant	Not bailable ...	Imprisonment of either des- cription for 7 years, and fine.	Court of Ses- sion or Ma- gistrate of the 1st class.
364	Kidnapping or abducting in order to murder.	Ditto	Ditto	Ditto	Transportation for life, or rigorous imprisonment for 10 years, and fine.	Court of Session.
365	Kidnapping or abducting with in- tent secretly and wrongfully to confine a person.	Ditto	Ditto	Ditto	Imprisonment of either des- cription for 7 years, and fine.	Ditto.
366	Kidnapping or abducting a woman to compel her marriage or to cause her defilement, &c.	Ditto	Ditto	Ditto	Imprisonment of either des- cription for 10 years, and fine.	Ditto.
367	Kidnapping or abducting in order to subject a person to grievous hurt, slavery, &c.	Ditto	Ditto	Ditto	Ditto	Ditto.
368	Concealing or keeping in confine- ment a kidnapped person.	Ditto	Ditto	Ditto	Punishment for kidnapping or abduction.	Ditto.

369	Kidnapping or abducting a child with intent to take property from the person of such child.	Ditto	...	Ditto	...	Ditto	...	Imprisonment of either description for 7 years and fine.	Ditto.
370	Buying or disposing of any person as a slave.	Shall not arrest without warrant.	...	Ditto	...	Bailable	...	Ditto	Ditto.
371	Habitual dealing in slaves	May arrest without warrant.	...	Ditto	...	Not bailable	...	Transportation for life, or imprisonment of either description for 10 years, and fine.	Ditto.
372	Selling or letting to hire a minor for the purpose of prostitution.	Ditto	...	Ditto	...	Ditto	...	Imprisonment of either description for 10 years, and fine.	Court of Session, or Magistrate of the 1st class.
373	Buying or obtaining possession of a minor for the same purpose.	Ditto	...	Ditto	...	Ditto	...	Ditto	Ditto.
374	Unlawful compulsory labour	Ditto	...	Ditto	...	Bailable.	...	Imprisonment of either description for 1 year, or fine, or both.	Any Magistrate.

*Of Rape.*

376	Rape	May arrest without warrant.	...	Warrant	...	Not bailable	...	Transportation for life, or imprisonment of either description for 10 years, and fine.	Court of Session.
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## CHAPTER XVI.—OFFENCES AFFECTING THE HUMAN BODY.—Concluded.

## Of Unnatural Offences.

1 Section	2 OFFENCE.	3 Whether the Police may arrest with- out warrant or not.	4 Whether a warrant or a summons shall ordinarily issue in the first instance.	5 Whether bail- able or not.	6 Punishment under the Indian Penal Code.	7 By what Court triable.
377	Unnatural offences	May arrest with- out warrant.	Warrant	Not bailable ...	Transportation for life, or im- prisonment of either des- cription for 10 years, and fine.	Court of Ses- sion.

## CHAPTER XVII.—OF OFFENCES AGAINST PROPERTY.

## Of Theft.

	May arrest without war- rant.	Warrant	Not bailable ...	Imprisonment of either des- cription for 3 years, or fine, or both.	Any Magis- trate.
379 Theft	...	Warrant	...	...	...
380 Theft in a building, tent, or vessel.	Ditto	Ditto	Ditto	Imprisonment of either des- cription for 7 years, and fine.	Ditto.
381 Theft by Clerk or servant of pro- perty in possession of master or employer.	Ditto	Ditto	Ditto	Ditto	Court of Ses- sion or Ma- gistrate of the 1st or 2nd class.

382	Theft, preparation having been made for causing death, or hurt, or restraint, or fear of death, or of hurt, or of restraint, in order to the committing such theft, or to retreating after committing it, or to retaining property taken by it.	Ditto	...	Ditto	...	Ditto	...	Rigorous imprisonment for 10 years, and fine.	Court of Session.
<i>Of Extortion.</i>									
384	Extortion	...	Shall not arrest without warrant	Warrant	...	Bailable	...	Imprisonment of either description for 3 years, or fine, or both.	Court of Session, or Magistrate of the 1st or 2nd class.
385	Putting or attempting to put in fear of injury, in order to commit extortion.	Ditto	...	Ditto	...	Ditto	...	Imprisonment of either description for 2 years, or fine, or both.	Ditto.
386	Extortion by putting a person in fear of death or grievous hurt.	Ditto	...	Ditto	...	Not bailable	...	Imprisonment of either description for 10 years, and fine.	Court of Session.
387	Putting or attempting to put a person in fear of death or grievous hurt, in order to commit extortion.	Ditto	...	Ditto	...	Ditto	...	Imprisonment of either description for 7 years, and fine.	Ditto.
388	Extortion by threat of accusation of an offence punishable with death, transportation for life, or imprisonment for 10 years.	Ditto	...	Ditto	...	Ditto	...	Imprisonment of either description for 10 years, and fine.	Ditto.

## CHAPTER XVII.—OF OFFENCES AGAINST PROPERTY—Continued.

## Of Extortion—continued.

Section	2 OFFENCE.	3 Whether the Police may arrest without warrant or not.	4 Whether a warrant or a summons shall ordinarily issue in the first instance.	5 Whether bailable or not.	6 Punishment under the Indian Penal Code.	7 By what Court triable.
	If the offence threatened be an unnatural offence.	Shall not arrest without warrant.	Warrant	Not bailable ...	Transportation for life	Court of Session.
389	Putting person in fear of accusation of offence punishable with death, transportation for life, or with imprisonment for 10 years, in order to commit extortion.	Ditto	Ditto	Ditto	Imprisonment of either description for 10 years, and fine.	Ditto.
	If the offence be an unnatural offence.	Ditto	Ditto	Ditto	Transportation for life	Ditto.

## Of Robbery and Dacoity.

Section	2 OFFENCE.	3 May arrest without warrant.	4 Warrant	5 Not bailable ...	6 Rigorous imprisonment for 10 years, and fine.	7 Court of Session or Magistrate of the 1st class.
392	Robbery	...	Warrant	Not bailable ...	Rigorous imprisonment for 10 years, and fine.	Court of Session or Magistrate of the 1st class.
	If committed on the highway between sunset and sunrise.	Ditto	Ditto	Ditto	Rigorous imprisonment for 14 years, and fine.	Ditto.



393	Attempt to commit robbery	...	Ditto	...	Ditto	...	Ditto	...	Rigorous imprisonment for 7 years, and fine.	Ditto.
394	Person voluntarily causing hurt in committing or attempting to commit robbery, or any other person generally concerned in such robbery.	...	Ditto	...	Ditto	...	Ditto	...	Transportation for life, or rigorous imprisonment for 10 years, and fine.	Ditto.
395	Dacoity	...	Ditto	...	Ditto	...	Ditto	...	Ditto	Court of Session.
	Murder in dacoity	...	Ditto	...	Ditto	...	Ditto	...	Death, transportation for life, or rigorous imprisonment for 10 years, and fine.	Ditto.
397	Robbery or dacoity with attempt to cause death or grievous hurt.	...	Ditto	...	Ditto	...	Ditto	...	Rigorous imprisonment for not less than 7 years.	Ditto.
398	Attempt to commit robbery or dacoity when armed with deadly weapon.	...	Ditto	...	Ditto	...	Ditto	...	Ditto	Ditto.
399	Making preparation to commit dacoity.	...	Ditto	...	Ditto	...	Ditto	...	Rigorous imprisonment for 10 years, and fine.	Ditto.
400	Belonging to a gang of persons associated for the purpose of habitually committing dacoity.	...	Ditto	...	Ditto	...	Ditto	...	Transportation for life, or as above.	Ditto.
401	Belonging to a wandering gang of persons associated for the purpose of habitually committing thefts.	...	Ditto	...	Ditto	...	Ditto	...	Rigorous imprisonment for 7 years, and fine.	Ditto.
402	Being one of five or more persons assembled for the purpose of committing dacoity.	...	Ditto	...	Ditto	...	Ditto	...	Ditto	Ditto.

## CHAPTER XVII.—OF OFFENCES AGAINST PROPERTY—Continued.

## Of Criminal Misappropriation of Property.

1 Section	2 OFFENCE.	3 Whether the Police may arrest with- out warrant or not.	4 Whether a warrant or a summons shall ordinarily issue in the first instance.	5 Whether bail- able or not.	6 Punishment under the Indian Penal Code.	7 By what Court triable.
403	Dishonest misappropriation of move- able property or converting it to one's own use.	Shall not arrest without warrant.	Warrant	Bailable	Imprisonment of either des- cription for 2 years, or fine, or both.	Any Magis- trate.
404	Dishonest misappropriation of pro- perty, knowing that it was in possession of a deceased person at his death, and that it has not since been in the possession of any person legally entitled to it.	Ditto	Ditto	Ditto	Imprisonment of either des- cription for 3 years, and fine.	Court of Session or Magis- trate of the 1st or 2nd class.
	If by clerk or person employed by deceased.	Ditto	Ditto	Ditto	Imprisonment of either des- cription for 7 years and fine.	Ditto.

## Of Criminal Breach of Trust.

406	Criminal breach of trust	May arrest with- out warrant.	Warrant	Not bailable	Imprisonment of either des- cription for 3 years, or fine or both.	Court of Ses- sion, or Ma- gistrate of the 1st or 2nd class.
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407	Criminal breach of trust by a carrier, wharfinger, &c.	Ditto	...	Ditto	...	Imprisonment of either description for 7 years, and fine.	Court of Session, or Magistrate of the 1st class.
408	Criminal breach of trust by a clerk or servant.	Ditto	...	Ditto	...	Ditto	Court of Session, or Magistrate of the 1st or 2nd class.
409	Criminal breach of trust by public servant, or by banker, merchant, or agent, &c.	Shall not arrest without warrant.	...	Ditto	...	Transportation for life, or imprisonment of either description for 10 years, and fine.	Court of Session, or Magistrate of the 1st class.

*Of the receiving of Stolen Property.*

411	Dishonestly receiving stolen property, knowing it to be stolen.	May arrest without warrant.	...	Warrant	...	Not bailable	Imprisonment of either description for 3 years, or fine, or both.	Court of Session, or Magistrate of the 1st or 2nd class.
412	Dishonestly receiving stolen property, knowing that it was obtained by dacoity.	Ditto	...	Ditto	...	Ditto	Transportation for life, or rigorous imprisonment for 10 years, and fine.	Court of Session.
413	Habitually dealing in stolen property.	Ditto	...	Ditto	...	Ditto	Transportation for life, or imprisonment of either description for 10 years and fine.	Ditto.

## CHAPTER XVII.—OF OFFENCES AGAINST PROPERTY—Continued.

*Of the receiving of Stolen Property—continued.*

1 Section	2 OFFENCE.	3 Whether the Police may arrest with- out warrant or not.	4 Whether a warrant or a summons shall ordinarily issue in the first instance.	5 Whether bail- able or not.	6 Punishment under the Indian Penal Code.	7 By what Court triable.
414	Assisting in concealment or disposal of stolen property knowing it to be stolen.	May arrest with- out warrant.	Warrant	Not bailable ...	Imprisonment of either des- cription for 3 years, or fine or both.	Court of Session or Magis- trate of the 1st or 2nd class.

*Of Cheating.*

417	Cheating ...	Shall not arrest without warrant.	Warrant	Bailable	Imprisonment of either des- cription for 1 year, or fine, or both.	Magistrate of the 1st or 2nd class.
418	Cheating a person whose interest the offender was bound, either by law or by legal contract, to pro- tect.	Ditto	Ditto	Ditto	Imprisonment of either des- cription for 3 years, or fine, or both.	Court of Ses- sion or Ma- gistrate of the 1st or 2nd class.

419	Cheating by personation	...	Ditto	...	Ditto	...	Ditto	...	Ditto	...	...	Ditto
420	Cheating and thereby dishonestly inducing delivery of property, or the alteration or destruction of a valuable security.	...	Ditto	...	Ditto	...	Ditto	...	Imprisonment of either description for 7 years, and fine.	...	...	Ditto.

*Of Fraudulent Deeds and Dispositions of Property.*

421	Fraudulent removal of concealment of property, &c., to prevent distribution among creditors.	...	Shall not arrest without warrant.	...	Warrant	...	Bailable	...	Imprisonment of either description for 2 years, or fine, or both.	...	...	Magistrate of the 1st or 2nd class.
422	Fraudulently preventing from being made available for his creditors a debt or demand due to the offender.	Ditto	...	...	Ditto	...	Ditto	...	Imprisonment of either description for two years, or fine or both.	...	...	Ditto.
423	Fraudulent execution of deed of transfer containing a false statement of consideration.	Ditto	...	...	Ditto	...	Ditto	...	Ditto	...	...	Ditto.
424	Fraudulent removal or concealment of property of himself or any other person, or assisting in the doing thereof, or dishonestly releasing any demand or claim to which he is entitled.	Ditto	...	...	Ditto	...	Ditto	...	Ditto	...	...	Ditto.

## CHAPTER XVII.—OF OFFENCES AGAINST PROPERTY.—Continued.

## Of Mischief.

1 Section	2 OFFENCE.	3 Whether the Police may arrest with- out warrant or not.	4 Whether a warrant or a summons shall ordinarily issue in the first instance.	5 Whether bail- able or not.	6 Punishment under the Indian Penal Code.	7 By what Court triable.
426	Mischief ... ..	... Shall not arrest without warrant.	... Summons	... Bailable	... Imprisonment of either des- cription for 3 months, or fine, or both.	Any Magis- trate.
427	Mischief, and thereby causing damage to the amount of 50 rupees or upwards.	Ditto	... Warrant	Ditto	Imprisonment of either des- cription for 2 years, or fine, or both.	Magistrate of the 1st or 2nd class.
428	Mischief by killing, poisoning, main- ing or rendering useless, any animal of the value of 10 rupees or upwards.	Ditto	Ditto	Ditto	Ditto	Ditto.
429	Mischief by killing, poisoning, main- ing or rendering useless, any elephant, camel, horse, &c., what- ever may be its value, or any other animal of the value of 50 rupees or upwards.	Ditto	Ditto	Ditto	Imprisonment of either des- cription for 5 years, or fine, or both.	Court of Ses- sion, or Ma- gistrate of the 1st or 2nd class.
430	Mischief by causing diminution of supply of water for agricultural purposes, &c.	May arrest with- out warrant.	Ditto	Ditto	Ditto	Ditto.

431	Mischief by injury to public road, bridge, river, or navigable channel, and rendering it impassable or less safe for travelling, or conveying property.	Ditto	...	Ditto	...	Ditto	...	Ditto
432	Mischief by causing inundation or obstruction to public drainage attended with damage.	Ditto	...	Ditto	...	Ditto	...	Ditto
433	Mischief by destroying or moving or rendering less useful a light-house or sea-mark, or by exhibiting false lights.	Ditto	...	Ditto	...	Ditto	...	Imprisonment of either description for 7 years, or fine, or both.
434	Mischief by destroying or moving, &c., a land-mark fixed by public authority.	Shall not arrest without warrant.	...	Ditto	...	Ditto	...	Imprisonment of either description for 1 year, or fine, or both.
435	Mischief by fire or explosive substance with intent to cause damage to amount of 100 rupees or upwards.	May arrest without warrant.	...	Ditto	...	Ditto	...	Imprisonment of either description for 7 years, and fine.
436	Mischief by fire or explosive substance with intent to destroy a house, &c.	Ditto	...	Ditto	...	Not bailable	...	Transportation for life, or imprisonment of either description for 10 years, and fine.
437	Mischief with intent to destroy or make unsafe a decked vessel or a vessel of 20 tons burden.	Ditto	...	Ditto	...	Ditto	...	Imprisonment of either description for 10 years, and fine.
438	The mischief described in the last section when committed by fire or any explosive substance.	Ditto	...	Ditto	...	Ditto	...	Transportation for life, or imprisonment of either description for 10 years, and fine.



## CHAPTER XVII.—OF OFFENCES AGAINST PROPERTY—Continued.

## Of Mischief—continued.

1 Section	2 OFFENCE.	3 Whether the Police may arrest with- out warrant or not.	4 Whether a warrant or a summons shall ordinarily issue in the first instance.	5 Whether bail- able or not.	6 Punishment under the Indian Penal Code.	7 By what Court triable.
439	Running vessel ashore with intent to commit theft, &c.	May arrest with- out warrant.	Warrant.	Not bailable...	Imprisonment of either des- cription for 10 years and fine.	Court of Ses- sion.
440	Mischief committed after prepara- tion made for causing death or hurt, &c.	Ditto	Ditto	Ditto	Imprisonment of either des- cription for five years and fine.	Ditto.

## Of Criminal Trespass.

447	Criminal trespass	May arrest without war- rant.	Summons	Bailable	Imprisonment of either des- cription for 3 months, or fine of 500 rupees, or both.	Any Magis- trate.
448	House-trespass	Ditto	Warrant	Ditto	Imprisonment of either des- cription for 1 year, or fine of 1,000 rupees, or both.	Ditto.
449	House-trespass in order to the com- mission of an offence punishable with death.	Ditto	Ditto	Not bailable...	Transportation for life, or rigorous imprisonment for 10 years, and fine.	Court of Ses- sion.

450	House-trespass in order to the commission of an offence punishable with transportation for life.	Ditto	...	Ditto	...	Ditto	... [Imprisonment of either description for 10 years, and fine.	Ditto.
451	House-trespass in order to the commission of an offence punishable with imprisonment.	Ditto	...	Ditto	...	Bailable	... Imprisonment of either description for 2 years, and fine.	Any Magistrate.
	If the offence is theft ...	Ditto	...	Ditto	...	Not bailable	... Imprisonment of either description for 7 years, and fine.	Court of Session, or Magistrate of the 1st or 2nd class.
452	House-trespass, having made preparation for causing hurt, assault, &c.	Ditto	...	Ditto	...	Ditto	... Ditto	Ditto.
453	Lurking house-trespass or house-breaking.	Ditto	...	Ditto	...	Ditto	... Imprisonment of either description for 2 years, and fine.	Magistrate of the 1st or 2nd class.
454	Lurking house-trespass or house-breaking in order to the commission of an offence punishable with imprisonment.	Ditto	...	Ditto	...	Ditto	... Imprisonment of either description for 3 years, and fine.	Court of Session or Magistrate of the 1st or 2nd class.
	If the offence is theft ...	Ditto	...	Ditto	...	Ditto	... Imprisonment of either description for 10 years, and fine.	Ditto.
455	Lurking house-trespass or house-breaking after preparation made for causing hurt, assault, &c.	Ditto	...	Ditto	...	Ditto	... Ditto	Court of Session, or Magistrate of the 1st class.

## CHAPTER XVII.—OF OFFENCES AGAINST PROPERTY—Continued.

## Of Criminal Trespass—continued.

1 Section of	2 OFFENCE.	3 Whether the Police may arrest without warrant or not.	4 Whether a warrant or a summons shall ordinarily issue in the first instance.	5 Whether bailable or not.	6 Punishment under the Indian Penal Code.	7 By what Court triable.
456	Lurking house-trespass or house-breaking by night.	May arrest without warrant.	Warrant	Not bailable...	Imprisonment of either description for 3 years, and fine.	Court of Session, or Magistrate of the 1st or 2nd class.
457	Lurking house-trespass or house-breaking by night in order to the commission of an offence punishable with imprisonment.	Ditto	Ditto	Ditto	Imprisonment of either description for 5 years, and fine.	Ditto.
	If the offence is theft ...	Ditto	Ditto	Ditto	Imprisonment of either description for 14 years, and fine.	Ditto.
458	Lurking house-trespass or house-breaking by night after preparation made for causing hurt, &c.	Ditto	Ditto	Ditto	Ditto	Court of Session, or Magistrate of the 1st class.
459	Grievous hurt caused whilst committing lurking house-trespass or house-breaking.	Ditto	Ditto	Ditto	Transportation for life, or imprisonment of either description for 10 years, and fine.	Court of Session.

460	Death of grievous hurt caused by one of several persons jointly concerned in house-breaking by night, &c.	Ditto	...	Ditto	...	Ditto	...	Ditto
461	Dishonestly breaking open or unfastening any closed receptacle containing or supposed to contain property.	Ditto	...	Ditto	...	Bailable	...	Imprisonment of either description for 2 years, or fine, or both.
462	Being entrusted with any closed receptacle containing or supposed to contain any property, and fraudulently opening the same.	Ditto	...	Ditto	...	Ditto	...	Imprisonment of either description for 3 years, or fine, or both.

Court of Session, or Magistrate of the 1st or 2nd class.

#### CHAPTER XVIII.—OF OFFENCES RELATING TO DOCUMENTS AND TO TRADE OR PROPERTY-MARKS.

465	Forgery	...	...	...	...	Bailable	...	Imprisonment of either description for 2 years, or fine, or both.	Court of Session.
466	Forgery of a record of a Court of Justice or of a Register of Births, &c.; kept by a public servant.	Ditto	...	Ditto	...	Not bailable	...	Imprisonment of either description for 7 years, and fine.	Ditto.
467	Forgery of a valuable security, will, or authority to make or transfer any public security, or to receive any money, &c.	Ditto	...	Ditto	...	Ditto	...	Transportation for life, or imprisonment of either description for 10 years, and fine.	Ditto.
	When the valuable security is a promissory note of the Government of India.	May arrest without warrant.	...	Ditto	...	Ditto	...	Ditto	Ditto.

## CHAPTER XVIII.—OF OFFENCES RELATING TO DOCUMENTS AND TO TRADE OR PROPERTY-MARKS.—Continued.

1 Section	2 OFFENCE.	3 Whether the Police may arrest without warrant or not.	4 Whether a warrant or a summons shall ordinarily issue in the first instance.	5 Whether bailable or not.	6 Punishment under the Indian Penal Code.	7 By what Court triable.
468	Forgery for the purpose of cheating.	Shall not arrest without warrant.	Warrant	Not bailable...	Imprisonment of either description for 7 years, and fine.	Court of Session.
469	Forgery for the purpose of harming the reputation of any person, or knowing that it is likely to be used for that purpose.	Ditto	Ditto	Bailable	Imprisonment of either description for 3 years, and fine.	Ditto.
471	Using as genuine a forged document which is known to be forged.	Ditto	Ditto	Ditto	Punishment for forgery	Ditto.
	When the forged document is a promissory note of the Government of India.	May arrest without warrant.	Ditto	Not bailable...	Ditto	Ditto.
472	Making or counterfeiting a seal, plate, &c., with intent to commit a forgery punishable under section 467 of the Indian Penal Code; or possessing with like intent any such seal, plate, &c., knowing the same to be counterfeited.	Shall not arrest without warrant.	Ditto	Ditto	Transportation for life, or imprisonment of either description for 7 years, and fine.	Ditto.

473	Making or counterfeiting a seal, plate, &c., with intent to commit a forgery punishable otherwise than under section 467 of Indian Penal Code, or possessing with like intent any such seal, &c.	Ditto	...	Ditto	...	Ditto	...	Imprisonment of either description for 7 years, and fine.	Ditto.
474	Having possession of a document, knowing it to be forged, with intent to use it as genuine.	Ditto	...	Ditto	...	Ditto	...	Ditto	Ditto.
475	Counterfeiting a device or mark used for authenticating documents described in section 467 of the Indian Penal Code, or possessing counterfeit marked material.	Ditto	...	Ditto	...	Ditto	...	Transportation for life, or as above.	Ditto.
476	Counterfeiting a device or mark used for authenticating documents other than those described in section 467 of the Indian Penal Code, or possessing counterfeit marked material.	Ditto	...	Ditto	...	Ditto	...	Imprisonment of either description for 7 years, and fine.	Ditto.
477	Fraudulently destroying or defacing, or attempting to destroy or deface, or secreting, a will, &c.	Ditto	...	Ditto	...	Ditto	...	Transportation for life, or imprisonment of either description for 7 years, and fine.	Ditto.

## CHAPTER XVIII.—OF OFFENCES RELATING TO DOCUMENTS AND TO TRADE OR PROPERTY-MARKS.—Continued.

## Of Trade and Property-Marks.

1 Section	2 OFFENCE.	3 Whether the Police may arrest without warrant or not.	4 Whether a warrant or a summons shall ordinarily issue in the first instance.	5 Whether bail-able or not.	6 Punishment under the Indian Penal Code.	7 By what Court triable.
482	Using a false trade or property-mark with intent to deceive or injure any person.	Shall not arrest without warrant.	Warrant	...	Imprisonment of either description for 1 year, or fine, or both.	Magistrate of the 1st or 2nd class.
483	Counterfeiting a trade or property-mark used by another, with intent to cause damage or injury.	Ditto	Ditto	Ditto	Imprisonment of either description for 2 years, or fine, or both.	Ditto.
484	Counterfeiting a property-mark used by a public servant, or any mark used by him to denote the manufacture, quality, &c., of any property.	Ditto	Summons	Ditto	Imprisonment of either description for 3 years, and fine.	Court of Session, or Magistrate of the 1st class.
485	Fraudulently making or having possession of any die, plate, or other instrument for counterfeiting any public or private property or trade-mark.	Ditto	Ditto	Ditto	Imprisonment of either description for 3 years, or fine, or both.	Ditto.
486	Knowingly selling goods marked with a counterfeit property or trade-mark.	Ditto	Ditto	Ditto	Imprisonment of either description for 1 year, or fine, or both.	Magistrate of the 1st or 2nd class.

487	Fraudulently making a false mark upon any package or receptacle containing goods, with intent to cause it to be believed that it contains goods which it does not contain, &c.	Ditto	...	Ditto	...	Ditto	Imprisonment of either description for 3 years, or fine, or both.	Court of Session, or Magistrate of the 1st or 2nd class.
488	Making use of any such false mark...	Ditto	...	Ditto	...	Ditto	Ditto	Ditto.
489	Removing, destroying, or defacing, any property-mark with intent to cause injury.	Ditto	...	Ditto	...	Ditto	Imprisonment of either description for 1 year, or fine, or both.	Magt. of the 1st or 2nd class.

## CHAPTER XIX.—OF THE CRIMINAL BREACH OF CONTRACTS OF SERVICE.

490	Being bound by contract to render personal service during a voyage or journey, or to convey or guard any property or person, and voluntarily omitting to do so.	Shall not arrest without warrant.	...	Bailable	...	Imprisonment of either description for 1 month, or fine of 100 rupees, or both.	Magistrate of the 1st or 2nd class.
491	Being bound to attend on or supply the wants of a person who is helpless from youth, unsoundness of mind or disease, and voluntarily omitting to do so.	Ditto	...	Ditto	...	Imprisonment of either description for 3 months, or fine of 200 rupees, or both.	Ditto.
492	Being bound by a contract to render personal service for a certain period at a distant place to which the employee is conveyed at the expense of the employer, and there voluntarily deserting the service or refusing to perform the duty.	Ditto	...	Ditto	...	Imprisonment of either description for 1 month, or fine of double the expense incurred, or both.	Ditto.



## CHAPTER XX.—OFFENCES RELATING TO MARRIAGE.

1 Section	2 OFFENCE.	3 Whether the Police may arrest with- out warrant or not.	4 Whether a warrant or a summons shall ordinarily issue in the first instance.	5 Whether bail- able or not.	6 Punishment under the Indian Penal Code.	7 By what Court triable.
493	A man by deceit causing a woman not lawfully married to him to believe that she is lawfully married to him, and to cohabit with him, in that belief.	Shall not arrest without warrant.	Warrant	Not bailable ...	Imprisonment of either des- cription for 10 years, and fine.	Court of Session.
494	Marrying again during the life-time of a husband or wife.	Ditto ...	Ditto	Bailable ...	Imprisonment of either des- cription for 7 years and fine.	Ditto.
495	Same offence with concealment of the former marriage from the person with whom subsequent marriage is contracted.	Ditto ...	Ditto	Not bailable ...	Imprisonment of either des- cription for 10 years, and fine.	Ditto.
496	A person with fraudulent intention going through the ceremony of being married knowing that he is not thereby lawfully married.	Ditto ...	Ditto	Ditto ...	Imprisonment of either des- cription for 7 years, and fine.	Ditto.
497	Adultery ... ..	Ditto ...	Ditto	Bailable.	Imprisonment of either des- cription for 5 years, or fine, or both.	Ditto.
498	Enticing or taking away or detain- ing with a criminal intent a married woman.	Ditto ...	Ditto	Ditto ...	Imprisonment of either des- cription for 2 years, or fine, or both.	Magistrate of the 1st or 2nd class.

## CHAPTER XXI.—OF DEFAMATION.

500	Defamation ... ..	... Shall not arrest without warrant.	Warrant	... Bailable	Simple imprisonment for years, or fine, or both.	2 Court of Session, or Magistrate of the 1st class.
501	Printing or engraving matter knowing it to be defamatory.	Ditto	Ditto	Ditto	Ditto	Ditto.
502	Sale of printed or engraved substance containing defamatory matter, knowing it to contain such matter.	Ditto	Ditto	Ditto	Ditto	Ditto.

## CHAPTER XXII.—OF CRIMINAL INTIMIDATION, INSULT, AND ANNOYANCE.

504	Insult intended to provoke a breach of the peace.	Shall not arrest without warrant.	Warrant	... Bailable	Imprisonment of either description for 2 years, or fine, or both.	Any Magistrate.
505	False statement, rumours, &c., circulated with intent to cause mutiny or offences against the public peace.	Ditto	Ditto	Not bailable	Imprisonment of either description for 2 years, or fine, or both.	Magistrate of the 1st or 2nd class.
506	Criminal intimidation ... ..	Ditto	Ditto	Bailable	Ditto	Ditto.
	If threat be to cause death or grievous hurt, &c.	Ditto	Ditto	Ditto	Imprisonment of either description for 7 years, or fine, or both.	Court of Session, or Magistrate of the 1st class.

## CHAPTER XXII.—OF CRIMINAL INTIMIDATION, INSULT, AND ANNOYANCE.—Continued.

1 Section	2 OFFENCE.	3 Whether the Police may arrest without warrant or not.	4 Whether a warrant or a summons shall ordinarily issue in the first instance.	5 Whether bailable or not.	6 Punishment under the Indian Penal Code.	7 By what Court triable.
507	Criminal intimidation by anonymous communication or having taken precaution to conceal whence the threat comes.	Shall not arrest without warrant.	Warrant	Bailable	Imprisonment of either description for 2 years, in addition to the punishment under above section.	Court of Session, or Magistrate of the 1st class.
508	Act caused by inducing a person to believe that he will be rendered an object of Divine displeasure.	Ditto	Ditto	Ditto	Imprisonment of either description for 1 year, or fine, or both.	Magistrate of the 1st or 2nd class.
509	Uttering any word or making any gesture intended to insult the modesty of a woman.	Ditto	Ditto	Ditto	Simple imprisonment for 1 year, or fine, or both.	Magistrate of the 1st class.
510	Appearing in a public place, &c., in a state of intoxication, and causing annoyance to any person.	Ditto	Ditto	Ditto	Simple imprisonment for 24 hours, or fine of 10 rupees, or both.	Any Magistrate.

## CHAPTER.—XXIII.—OF ATTEMPTS TO COMMIT OFFENCES.

1 Section	2 OFFENCE.	3 According as the offence is one in respect of which the Police may arrest without warrant or not.	4 According as the offence is one in respect of which a summons or warrant shall ordinarily issue.	5 According as the offence contemplated by the offender is bailable or not.	6 Transportation or imprisonment not exceeding half of the longest term and of the description provided for the offence, or fine or both.	7 By the Court by which the offence is triable.
511	Attempting to commit offences punishable with transportation or imprisonment, and in such attempt doing any act towards the commission of the offence.	According as the offence is one in respect of which the Police may arrest without warrant or not.	According as the offence is one in respect of which a summons or warrant shall ordinarily issue.	able or not.	Transportation or imprisonment not exceeding half of the longest term and of the description provided for the offence, or fine or both.	By the Court by which the offence is triable.

sive, they undoubtedly shew what was the amount of rent payable for the year preceding that for which the suit was brought, and prove that in that year the Putneedar was entitled to receive and did receive rent at Rs. 11 odd, now as the Putneedar was then the only person qualified to demand rent from the defendants, the result of the decree in his favor was to fix the rent "payable," for the years in question, one of which is the year preceding that for which rent is claimed in this suit—and to bring the defendant's case within the purview of Section 13 Act X of 1859 (Section 14 Act VIII 1869 B. C.). That being so the landlord whether Putneedar or Zemindar was not entitled to take from the ryots a higher rent before serving them with a written notice specifying the rent to which they were to be made liable for the ensuing year. It appears to us therefore that the first Court came to a proper decision in this case, and that the plaintiff is not entitled to enhance the defendant's rent from Rs. 11, the rate that was found to be payable for the year preceding the period for which the suit was brought, to Rs. 72-14 annas, however much that rent may have been paid for years previous to the grant of the Putnee without serving them with a written notice in due course of law.

The special appeal is accordingly allowed, the judgment of the Lower Appellate Court reversed, and that of the first Court restored with costs.

THE 15TH JANUARY, 1873.

*Present :*

The Hon'ble Sir R. COUCH,  
Knight, ... *Chief Justice,*  
and

The Hon'ble DWARKANATH { *One of the Judges*  
MITTER, ... { *of the said Court.*

CASE NO. 53 OF 1872.

*Regular Appeal from a Decision passed by the Subordinate Judge of Zillah Tirhoot, dated the 6th of February 1872.*

Narain Lall and Shetabo Saboon,  
two of the (Defts.) ... *Appellants,*

*versus*

Lalla Nundkishore Lall, and  
others, ... } *Respondents.*

Appeal valued at Rupees 5,484-4-11.

*For Appellant.*—Mr. R. E. Twidale.

*For Respondants.*—Baboo Chunder Madhub Ghose.

Under Sec. 1 Cl. 15 Act XIV of 1859 the acknowledgment must be given within the period of 30 or 60 year according to the nature of the property.

*Sir R. Couch, Chief Justice.*—Upon the first question, namely, whether the *kobala* was an acknowledgment in writing sufficient to prevent the operation of the law limitation, I think that the proper construction of clause 15 Section 1, is, that the acknowledgment must be given within the period of 30 years or 60 years, according to the nature of the property. If the words "in the meantime" were left out of that Clause, it would be like Section 4, and would allow the acknowledgment to be given at any time before the suit was brought; so far from Section 4 assisting the respondent, I think it rather, has, the opposite effect, because when we see the words "in the meantime" in Clause 15, we must suppose, that the Legislature introduced them for some purpose, and if effect can be given to them, we are bound to do so. The only way, as it seems to me, in which we can give effect to those words is by holding that they refer to the periods which had been previously mentioned, the 30 years or the 60 years; and although there does not appear to have been any express decision on this point and what have been quoted to us are only *obiter dicta*, I agree with them. I think that the fair and ordinary meaning of Clause 15 is, that the acknowledgment must be given within the 30 or 60 years, and there is reason for supposing that the Legislature intended that, in the long period which is given to the mortgagor to bring a suit against the mortgagee,—very different from the time of limitation prescribed in the cases to which the 4th Section applies.

Then as to the question of fact which has been argued in this appeal, namely, whether the *Ikrarnamah* is a genuine document, it is not disputed that the reasons which the Subordinate Judge gives for his opinion that it is not genuine are correct. What he says with regard to the witnesses is quite true, and it appears to me improbable that these mortgagees after the lapse of so long a time would enter into an agreement of this kind, and give up all the advantage which they must have had in any litigation, even sup-

posing that the suit might under the then law of limitation, have been commenced against them. Looking at the improbability of their doing that, the evidence is not at all such as would lead us to the conclusion that this *Ikrarnamah* was really given. It appears to be correct that the plaintiffs abstained from examining two of the witnesses whom they might have examined. The witnesses were present, but the plaintiffs would not pay their expenses. If that was so, it is significant, because it is scarcely likely that if these witnesses would have supported their case, they would not have paid their expenses, one of them being the person who appeared before the *Cazee*. Their not examining them, may probably be accounted for by their having reason to suppose that if they did so, they would not have supported their case.

Then the Subordinate Judge remarks with regard to the registration before the *Cazee*, that there is an omission of the descriptive roll of witnesses which he says it was customary to enter. This was certainly a case in which it was incumbent upon the plaintiffs to prove satisfactorily that this *Ikrarnamah* was really given, and the witnesses whom they examined for that purpose contradicted each other. I can see no reason for thinking that the conclusion which the Subordinate Judge has come to, he having the witnesses before him, is a wrong one.

The decree of the Lower Court must be reversed and the plaintiff's suit dismissed with costs in both Court.

THE 21ST JANUARY 1873.

Present :

The Hon'ble LOUIS S. JACKSON, }  
" " DWARKA NATH MITTER, } Judges.

CASE No. 286 OF 1872.

*Miscellaneous Regular Appeal from an order, passed by the Judge of Nuddeah, dated the 6th September 1872.*

Hurry Nath Koondo, opposite party

versus

Modhoosoodun Shaha and another, petitioners

Respondents.

*For Appellant.*—Baboo Romesh Chunder Mitter.

*For Respondents.*—Baboo Mohiny Mohun Roy.

Summary orders made by the District Judge under Regulation I of 1798 are not open to an appeal.

*Jackson, J.*—We think the preliminary objection taken in this case must prevail, viz., that in summary orders made by the District Judge under Regulation I of 1798, no appeal is provided. The appellant's vakeel relies on section 38 Act XXIII of 1861, which provides that the procedure prescribed by Act VIII of 1859, shall be allowed, as far as it can be, in all miscellaneous cases and proceedings which, after the passing of the Act, shall be instituted in any Court. This, it is contended, gives amongst other things a right of appeal in all miscellaneous cases and proceedings whatever by taking that section in combination with section 23 of the same Act. It appears to me however that this construction is altogether strained. All that is said in section 38 is, that in trials and investigations in miscellaneous cases and proceedings, the procedure, that is the mode of trial and the procedure incidental and ancillary thereto laid down in the Civil Procedure Code, should be applied throughout those cases and proceedings. I may observe also that if the construction put forward is correct, it was quite superfluous in subsequent enactments, such as the Indian Succession Act to make express provision for appeals. If Baboo Romesh Chunder Mitter's argument is correct, such an appeal would be allowed by the general terms of section 38. My learned brother reminds me that the word 'decrees' in section 23 refers to decrees passed by the Court of original jurisdiction in regular suits and those unless questioned in appeal decrees of arrived at are binding and conclusive in questions of title between the parties to the suit, but the matter on which the present case turns is not a final and conclusive determination of a question of title. It is what used to be called a summary order which is open to question in a regular suit.

The objection therefore is allowed and the appeal dismissed with costs.

THE 24TH JANUARY 1873.

(Before the Hon'ble F. A. Glover and the  
Hon'ble D. N. Mitter, Judges.)

CASE NO. 616 OF 1872.

*Special Appeal from a Decision passed by the  
Officiating Judge of Cuttack, dated the 4th  
January 1872, reversing a decree of the  
Moonsiff of Balasore, dated 27th March  
1871.*

Kashynath Pussee, ... (Def.) Appellant,  
versus

Choudhry Lakhmonee }  
Pershad Putnaik and } (Plffs.) Respondents.  
others ... }

For Appellant.—Baboo Mohendro Lall  
Mitter.

For Respondents.—Baboo Ohhoy Churn  
Bose.

The mere fact of a *surburakaree* tenure being transferred without the zemindar's consent, would not do away with the rights of the *surburakar* unless the latter chose to relinquish them.

This suit was brought by the plaintiff to reverse an order made by the Commissioner, directing him to register in his zemindary roll the name of the defendant, the purchaser of a certain *surburakaree* tenure.

This tenure appears to be of a permanent hereditable nature, and a description of it is to be found in the case of Sudanundo Mytee against Nowrutton Mytee, XVI. W. Reporter, page 290.

The Judge has held that it is a fact admitted by both sides that a tenure of this sort cannot be transferred without the consent of the zemindar, and also that the consent in this case was not given. He considered therefore that the order directing the plaintiff to register the defendant in his *sherishtah* was an improper one; he also decided that as the tenure was transferred without the consent of the zemindar, the plaintiff was entitled to be maintained in possession.

Now, regarding the first point, there appears to be no contest between the parties that before a *surburakaree* tenure can be transferred by sale, the consent of the zemindar is necessary, and it is not denied before us that such consent was not given. The transfer therefore to the defendant was an improper transfer, and the Judge was right in directing that the zemindar should not be compelled to register the purchaser in his *sherishtah*.

But we cannot uphold that part of his decision which directs that the zemindar should get what is called  *khas*  possession of the land. The mere fact of such a tenure being transferred without the zemindar's consent would not do away with the rights of the *surburakar*; the only thing that would be done away with would be the transfer itself, that is to say, the zemindar would not be bound to recognize the transfer, and the parties would revert to their original position, and the property would remain the property of the old *surburakar*, in whose possession it was before the transfer was made.

But it is said that the zemindar had brought evidence in the first Court to prove that the old *surburakar* had relinquished his rights in this tenure to the zemindar, and it was after that relinquishment that the zemindar's son caused this tenure to be sold in execution of decree, under which sale the defendant acquired it. We find on looking at the first Court's decision that there was evidence of this fact which, however, the moonsiff disbelieved. We think that the zemindar has the right to have this evidence, especially as this was a point raised in the appeal to the Judge, considered by the Appellate Court, because, if he could show by that evidence that the old *surburakar* had relinquished all his rights in the tenure before the sale, there would be no objection to the zemindar getting a decree to be maintained in possession.

Therefore the first part of the order of the Lower Court will be upheld, but on this point, namely, as to whether there was any relinquishment on the part of the old *surburakar*, the case will be remanded to the Court below. We make no order as to costs.

THE 24TH JANUARY 1873.

(Before the Hon'ble F. A. Glover and the  
Hon'ble D. N. Mitter, Judges.)

CASE NO. 615 OF 1872.

*Special Appeal from a Decision passed by the  
Subordinate Judge of East Burdwan, dated  
the 30th of November 1871, affirming a decree  
of the Moonsiff of Kulnah, dated the 15th  
of December 1870.*

Bisto Chunder Banerjee (Plf.) Appellant,  
versus

Nithoromonee Debia, }  
alias Pootee Debia } (Dfts.) Respondents.  
and another, ... }

*For Appellant.*—Baboo Umbica Churn Banerjee.

*For Respondents.*—Baboo Grish Chunder Mookerjee.

Act XXXII. of 1839 does not apply to contribution suits.

*Glover, J.*—The plaintiff in this suit was the purchaser of a right of action in a contribution suit against certain parties. He brought the suit, and was successful in getting a decree against the defendants for certain sums to be paid by them severally. The present special appeal is preferred on the subject of interest. The Subordinate Judge refused interest on two grounds: first, because by Act XXXII. of 1839, no interest could be allowed, inasmuch as no written demand had been served on the debtor; and, secondly, because the decree-holder had allowed five years to elapse before making his demand for interest.

The first reason given by the Subordinate Judge is no doubt wrong, Act XXXII. of 1839 not applying to contribution suits. This point has been ruled in the case of *Golam Ahmed Shah vs. Baharee Lal*, Marshall's Reports, page 239, and in the case of *Lulleet Biswas against Prossunno-moyee Dossee*, XVII. W. R., p. 179; but the Judge has given another reason which we consider a reasonable one, namely, that the decree-holder slept over his rights for no less than five years before making his demand for contribution, and we do not see any error in law which would justify our interfering with his order. There was no contract between the parties to pay interest, and there is no rule of law by which, in the absence of such contract, an award of interest is made compulsory. It was within the discretion of the Court below either to give or to withhold interest, and there is no ground for our interfering with his order.

The special appeal is dismissed with costs.

*Mitter, J.*—I concur.

THE 30TH JANUARY, 1878.

*Present:*

The Hon'ble F. B. KEMP, } Judges.  
" " C. PONTIFEX, }

CASE No. 711 OF 1872.

*Special Appeal from a Decision passed by the Judge of Bhairulpore, dated the 2nd January 1872, affirming a decree of the Sudder Moonsiff of that district, dated the 2nd June 1871.*

Baboo Ramnarain Lall, { Plaintiff,  
Appellant,

versus

Gumber Singh ... { Defendant,  
Respondent.

*For Appellant.*—Baboo Bamachurn Banerjee.

*For Respondent.*—Baboo Ramchurn Mitter.

Where a plaintiff sued for rents on account of land found to be in defendant's possession in excess of the quantity mentioned in the Kulolet, which provided that if on measurement the actual arrear was found to be in excess of that mentioned therein, the ryot would pay for the whole land at the rate specified, it was held that no notice was necessary to be served on the ryot as he was not holding or cultivating land without a written engagement, or under a written engagement not specifying any period, and as there was no question of enhancing the rate of rent.

The facts may be gathered from the judgment.

*Mr. Justice Pontifex.*—This is a suit for rent of the years 1277 and 1278 after deducting payments made by the ryot. The suit was based upon a kulolet, dated the 27th of Pous 1277. The plaint goes on to say that the original puttah was for 29 beegahs 10 cuttals of land at the rate of Rs. 2-13 annas per beegah; that there was a stipulation, that if, on measurement the actual area was found to be in excess of the 29 beegahs 10 cuttals, the ryot would pay for the whole land, that is to say for the 29 beegahs 10 cuttals plus any excess that might be found on measurement, at the same rate, namely, at the rate of Rs. 2-13 annas per beegah. The plaint then states that on measurement it was found that the defendant, the ryot holds 41 beegahs 17 cottals which at the rate of Rs. 2-13 per beegah, yields a jumma of Rs. 135-5 annas and that after deducting payments made by the defendant, amounting to Rs. 127-11-5, the suit was brought for the balance due for the period above stated. The pleas raised by the ryot defendant were two, namely, 1st, that he is entitled to notice under sections 18 and 19 of Act VIII. of 1859, and 2nd, on the merits he

denies that there is any excess area, but on the contrary that the area is as stated in the original puttah, namely, 29 beegahs 10 cuttahs. Both Courts have dismissed plaintiff's claim on the preliminary objection taken by the ryot that notice ought to have been served.

We think that these decisions are wrong. The defendant is not a ryot holding or cultivating land without a written engagement or under a written engagement not specifying any period. In this case there was no question of enhancing the rate of rent and the terms of the kubooleut which has been read to us are clear to the effect that after measurement the ryot will pay for any lands which may be found to be in excess of the land mentioned in the kubooleut, namely, 29 beegahs 10 cuttahs, at the same rate of Rs. 2-13 per beegah from the date of the kubooleut, namely, the 27th of Pous 1277. We therefore reverse the decision of the Court below and remand the case for trial on the second plea raised by the ryot, namely, what is the area in his occupation.

Costs to follow the result.

DECEMBER 2, 1872, AND FEBRUARY 1, 1873.

FULL BENCH.

(Before Sir R. Couch, Kt., Chief Justice, Mr. Justice L. S. Jackson, Mr. Justice Glover, Mr. Justice Mitter, and Mr. Justice Pontifex.)

CALLY CHURN MULICK vs. BHUGGODUTTY CHURN MULICK.

In the matter of the Petition of Benud Beharry Mullick.

The age of majority of a Hindu, resident and domiciled in the town of Calcutta and not possessed of any property in the Mofussil is the end of the fifteenth year.

The following case was referred to a Full Bench, on the 21st August 1872, by Mr. Justice Macpherson.

"The petitioner, Benud Beharry Mullick, is entitled to have certain monies, which are now in Court, paid over to him on his attaining majority. He applies for payment of the money now, on the ground that he has attained majority. He states in his petition (which is verified) :—

"That your petitioner is a resident of Calcutta from his birth, and domiciled therein, and that the said Romanauth

Mullick, the father of your petitioner, was also a resident of Calcutta, and domiciled therein, and that your petitioner has no properties situated in the mofussil. That your petitioner is now of the age of sixteen years and six months, and therefore has attained the age of majority."

"This raises the question whether, under Act XL of 1858, eighteen is the age of majority of Hindus resident and domiciled in the town of Calcutta, and not possessed of property in the mofussil.

"Until quite recently sixteen was always deemed to be the age of majority among Hindus in Calcutta, but doubts have been entertained on the subject since the decision of the Full Bench in the case of *Madhusudan Manjee* (1 B. L. R. 49); and in *Jadunath Mitter vs. Bolye Chand Dutt* (7 B. L. R. 607). Phear, J., held that, by the operation of Act XL of 1858, the period of minority extends, among Hindus, to eighteen years, as well within the original civil jurisdiction of the High Court as within the jurisdiction of the Civil Courts in the mofussil. More lately the same learned Judge held, in *Archer vs. Watkins* (8 B. L. R. 372), that an Eurasian in Calcutta, who is not an European British subject, comes under Act XL of 1858, and therefore attains majority at eighteen years.

"The question was raised before me (but not decided) in the matter, *In the goods of Gangaprasad Gosain* (4 B. L. R. 43); and also before the Appellate Court (5 B. L. R. 80).

"In his judgment in the case of *Kamikhaprasad Roy* (5 B. L. R. 517), Mr. Justice Markby states that, as in the course of evidence it appeared that one of the parties was of the age of seventeen years, 'and as it has been held that a Hindu does not come of age till eighteen,' he had ordered a guardian for him to be appointed, &c.

"It appears to me that Act XL of 1858 was intended to apply to the mofussil, and not to persons residing in the town of Calcutta, and not possessed of property in the mofussil. But the matter is a very important one, and therefore I refer it for the decision of a Full Bench.

"The questions I refer are :—

"1. What is the age of majority of a Hindu resident and domiciled in the town of Calcutta, and not possessed of any property in the mofussil?



"2. To what extent does Act XL of 1858 have operation on persons resident in the town of Calcutta?"

*The Advocate-General and Mr. Woodroffe for the petitioner.*

*Mr. Lowe for the plaintiff.*

*Mr. Kennedy for the defendant, who was the petitioner's guardian.*

*Mr. Phillips for the receiver.*

*The Advocate-General.*—In order to ascertain the purpose of Act XL of 1858, we should look, not to the title of that Act, but to the Regulations which are repealed by section 1. All these Regulations refer to the *mofussil*. Section 29 expressly enacts that the expression "Civil Court," as used in the Act, shall not include the Supreme Court, and that "nothing contained in this Act shall be held to affect the powers of the Supreme Court over the person or property of any minor subject to its jurisdiction." Section 26 describes who are minors for the purposes of the Act. The Act was evidently intended to apply only to Hindus possessed of property in the *mofussil*. The ruling of Mr. Justice Phear in the case of *Jadunath Mitter vs. Bolye Chand Dutt* (7 B. L. R. 607) is, I submit, incorrect. There is no clear expression of any intention on the part of the Legislature to interfere with the law which formerly prevailed in Calcutta on this subject; and surely, had it been intended to make any change, it would not have been expressed in a vague and general way. Again, 18 is fixed as the age of majority, not generally, but only "for the purposes of this Act," and had the Act finally fixed the age of majority, it would have been unnecessary, in the succession and other Acts, to fix it at 18 for the purposes of these Acts. It may perhaps be urged that the Court is bound by the ruling in the case of *Madhusutan Manjee vs. Debigobinda Newgi* (I B. L. R., F. B., 49), but in the case of *Mahomed Alik vs. Asadunissa Bibee* (9. W. R. I) a Full Bench ruling was subsequently set aside by another Full Bench. In *Archer vs. Watkins* (8 B. L. R. 372), it was held by Mr. Justice Phear that Act XL of 1858 applies to Eurasians. If that ruling is correct, then this Act does affect the powers of the Court. Mr. Justice Macpherson, in the case of *In the goods of Gangaparsad Gossain* (4 B. L. R. App. 49), expresses no opinion, but seems to think that Act XL of 1858 applies only to the *mofussil*.

Mr. Lowe, for the plaintiff, and Mr. Kennedy, for the petitioner's guardian, raised no objection to the order prayed for.

*Mr. Phillips for the Receiver.*—Act XL of 1858 describes how the Civil Courts are to act in respect of the property of minors, and it does affect the powers of the Supreme Court, which had a similar jurisdiction over the property of minors in Calcutta. Section 26 may have been intended to define the age of majority both for Calcutta and for the *mofussil*. It has been urged that the extension of this Act to Calcutta would affect the powers of the Court. But the argument was well answered by Mr. Justice Phear, who in his judgment in *Jadunath Mitter vs. Bolye Chand Dutt* (7 B. L. R. 614) remarked that it would do so only by lengthening "the period of time in each case during which those powers can be exercised." Again, an alteration in the age of majority affects only the *status* of minors, and not the powers of the Court over minors.

Their Lordships took time to consider, and on the 1st February 1873 the judgment of the Court was delivered as follows by

*Couch, C. J.*—The questions referred to the Full Bench are:—

"1. What is the age of majority of a Hindu resident and domiciled in the town of Calcutta, and not possessed of any property in the *mofussil*?"

"2. To what extent does Act XL of 1858 have operation on persons resident in the town of Calcutta?"

Having heard these questions argued by the Advocate-General, who appeared for the petitioner, we thought it advisable, before giving our opinions to learn what rule had been followed by the Supreme Court, and afterwards by the High Court, since the passing of Act XL of 1858, and before the decisions mentioned in the order of reference.

We therefore caused a search to be made amongst the records of the Court on the original side, and the result of it is this.

In *Keerut Chunder Sircar and others vs. Hulloohur Ghose*, a report was made by Mr. Justice Morgan on the 22nd of April 1863, finding that the infant plaintiff, Bhoobun Mohun Ghose, had attained his full age of 16 years; and an order, dated the 6th of May 1863, was made, discharging the next friend of the plaintiff, and allowing him to prosecute the suit.

In *Debender Narain Roy and others vs. Obhoy Churn Sen and others*, it having been proved by affidavit that the plaintiff had obtained the age of 16 years, an order was made on the 15th December 1863, discharging the next friend of the plaintiff, and allowing him to prosecute the suit.

In *Anund Gopal Dutt vs. The Secretary of State*, Mr. Justice Levingo made a report, dated the 30th January 1864, finding that the defendant Bhoobun Mohun Dutt had attained his full age of 16 years, on which an order was made, on the 25th of February 1864, directing the defendant's share of the fund in Court to be paid to him.

In *Anund Lall Dutt and others vs. Sreemutty Monomoheenee Dasee*, an order was made, on the 25th of August 1864, discharging the next friend of Anund Lall Dutt, and allowing him to continue the suit, as he had attained the age of 16 years.

In *Monohur Doss and others vs. Bullub Doss and others*, an order was made on the 14th of January 1867, discharging the Receiver as to Rankissen Doss's share of the property, and directing his share to be delivered to him, he having attained the age of 16 years. In the same suit a like order was made on the 10th of September 1868 as to Radhakissen Doss's share of the property, he having attained the age of 16 years.

In *Pertaub Chund Doss vs. Sacoor Doss Sett and others*, an order was made on the 23rd of March 1871, discharging the Receiver, and directing the plaintiff's share of the property to be delivered to him, as he had attained the age of 16 years.

In *Monomothonath Dey and Onathnath Dey vs. Aushootosh Dey and others*, a report was made by Sir Charles Jackson, on the 24th of September 1862, which found that the plaintiff Monomothonath Dey had attained the full age of 16 years, and an order was made, on the 14th of June 1866, directing the arrears of maintenance to be paid to him out of the fund in Court. In the same suit a report by Mr. Justice Phear was filed on the 8th August 1866, finding that the other plaintiff, Onathnath Dey, had attained his full age of 16 years; and an order was made on the 2nd of March 1867, directing the arrears of maintenance and future maintenance to be paid to him out of the fund in Court. Then, in the same suit, an order was made, dated the 8th of August 1872,

discharging the Receiver, and directing the property in his hands to be delivered and paid to the plaintiffs.

On the 11th of May 1867, in the suit of *Otool Chunder Bose and others vs. Sreemutty Komulmonnee Dossee and others*, Otool Chunder Bose having attained the age of 16 years, an order was made for the discharge of the next friend.

In *Sreemutty Gobind Soondery Dabee vs. Hem Chunder Gossain and Gopaul Chunder Gossain*, an order was made, on the 18th of December 1871, discharging the guardian *ad litem*, Gopaul Chunder Gossain having attained the age of 18 years.

In another suit, *Sreemutty Unnopoornah Dossee vs. Bhoobhun Mohun Neoghy and others*, an order was made, on the 9th of September 1872, for the discharge of the next friend, the plaintiff having attained the age of 18 years, and subsequently, in another case (*In the goods of the Hon'ble Prosonno Coommar Tagore, deceased*), on the 20th December 1872, on the statement that the guardian of the infants had declined to act further, and that one of the infants had attained his majority, or age of 18 years, an order was made that another guardian should be appointed for the other persons, who were still infants.

It seems that, until the order of Mr. Justice Markby in the case of *Khamikha Prosad Roy*, the age of majority of a Hindu resident at Calcutta was considered in this Court to be 16 years. It does not appear that there was any argument upon the question before Mr. Justice Markby made the order which he refers to in his judgment in 5 B. L. R., 517. In the argument reported in 7 B. L. R. 609, an unreported decision of Mr. Justice Norman to the same effect is quoted, but the date of it is not given. In the case before Mr. Justice Phear (7 B. L. R. 607) the question was argued, and the decision reserved. This was in August 1871, from which time it seems the decision has been followed.

In considering the questions referred to us, we cannot overlook the fact that, for more than 10 years after the passing of Act XL of 1858, the Judges of this Court, sitting on the original side, did not consider that it had made any alteration in the law administered by this Court on its original side as to the age of majority of Hindus, which had been held in the Supreme Court

(*Nocoor Bysack vs. Gopalchund Seal*, Morton's Reports, 82) to be 16 years.

And, no doubt, this view of the law must have been frequently acted upon during these years, and many titles to property in Calcutta must depend upon it. However great the inconvenience which would arise from our coming to a decision invalidating those titles might be, we should be bound to do so if the construction of the Act were clear; but, if it is doubtful, this inconvenience may be a reason for following what we may regard as the contemporaneous exposition of the Act.

The question depends upon what is meant in section 26 by the words, "For the purposes of this Act, every person shall be held to be a minor who has not attained the age of eighteen years." The title of the Act is "An Act for making better provision for the care of the persons and property of minors in the Presidency of Fort William in Bengal." If we looked only at the title and section 26, we might say that the town of Calcutta was within the purposes of the Act, it being included in the Presidency of Fort William. But the title of an Act, although it may sometimes aid in the construction of it, is not a safe exposition of the law, being often loosely and carelessly inserted, and there is the established rule that in the exposition of statutes the intention is to be deduced from a view of the whole and of every part taken and compared together.

The general statement in the title and preamble of the Act is not sufficient to show what are its purposes. We must look for them in the provisions which are made in it. The purpose is stated generally in the 2nd section, viz, the subjecting to the jurisdiction of the Civil Court the care of the persons of all minors (except European British subjects) and the charge of their property, except proprietors of estates who have been or shall be taken under the protection of the Court of Wards. The sections which follow contain provisions for effecting this, and are followed by section 26. We think the word "purposes" there refers to the provisions in the preceding section. Then section 29 defines the expression, "Civil Court," as used in the Act, to be the principal Court of original jurisdiction in the district, and not to include the Supreme Court. Consequently none of the

powers conferred by the Act could be exercised within the jurisdiction of the Supreme Court. The proviso that nothing contained in the Act should be held to affect the powers of the Supreme Court over the person or property of any minor subject to its jurisdiction was unnecessary, and seems to have been inserted from abundant caution.

We think the construction which was first put upon the Act, that it did not alter the Hindu law in Calcutta as to the age of majority, was the right one, and that such a change was not intended by the legislative authority when the Act was passed.

If it is desirable that the law should be uniform in Calcutta and the mofussil, it may be made so by the Legislature, without affecting existing titles, which must be affected by a decision of this Court, as we should declare what the law has been since the passing of Act XL. of 1858. As to Mr. Justice Phear's reason, that we ought not to attribute to the Legislature the intention to set up for the same persons two standards of majority, one to prevail in the mofussil, and the other in Calcutta, we think the answer is that two standards had been set up in the mofussil by Regulation XXVI. of 1793, and it was the state of the law until Act XL. of 1858 was passed.

It appears to us that the grounds upon which the Full Bench came to the decision in 1 B. L. R., 49, do not apply to the questions before us.

We think the first question should be answered by saying that the age of majority in such cases is the end of the 15th year.

The second question does not arise in the case, it being stated that the petitioner has no property in the mofussil, we will not undertake now to define to what extent the Act may operate when a person resident in the town of Calcutta has property in the mofussil.

of the Magistrate under Section 62 to *modify* the enjoyment of such right, at least for a temporary period, by imposing upon the owner of the property such conditions as the Magistrate, after taking into consideration all the facts and surrounding circumstances of each particular case, shall consider necessary to prevent a riot or an affray. Every individual right, is, to a certain extent, subject to the general interest of society; and after giving our best consideration to the question referred to us, we feel ourselves bound to come to the conclusion that the Legislature has purposely vested the Magistrate with powers sufficient to cover a case like the one mentioned in the order of reference. It is notorious that in this country rival *hauks* are frequent sources of riot and affray; and there is some thing in the nature of such *hauks*, namely, the assemblage of large crowds of men on both sides, which may be said to have a certain tendency to lead to a breach of the peace. We do not mean to say that such general facts alone are sufficient to justify the exercise of the discretion vested in the Magistrate by Section 62. But we think that there may be other circumstances connected with those general facts,—as for instance, the existence of bitter hostility between the owners of the rival *hauks*, the preparations already made by them for the commission of a breach of the peace, &c.,—which might render it absolutely necessary to exercise that discretion for the preservation of public tranquility.

THE 17TH JANUARY 1873.

*Present :*

The Hon'ble J. B. PHEAR and

The Hon'ble W. Ainslie,

*Two of the Judges of the Court.*

Ramkishore Sein ... .. *Petitioner.*

*For Petitioner.*—Mr. J. T. Woodroffe and  
Baboo Issur Chunder Chuck-  
erbutty.

*Per Phear, J.*—Held, that until a Magistrate had judicially found as a fact upon sufficient information that the person against whom the proclamation is to issue had absconded or concealed himself for the purpose of avoiding apprehension under a warrant, he had no authority to issue that proclamation.

*Per Phear, J.*—Held, that the period of 30 days which is prescribed in Section 183, was intended by the Legislature to run from the date on which the publication in the mode prescribed by the same Section should be effected.

*Per Phear, J.*—Held, that the declaration of forfeiture directed to be made under Section 184, if not made before the person affected by the proclamation has come in, or has been brought in, it ought not to be made at all.

*Mr. Justice Phear.*—It appears to me that the matter brought before us on this petition has been a most unfortunate one at every stage. Irregularity is apparent on the proceedings at almost every step in the case.

In April 1871, the Magistrate of Maldah, after taking the deposition of one Heeralall Doss, issued a warrant of arrest, upon a charge of forgery, against five persons including Ramkishore Sein, the present petitioner. This warrant was infructuous; and on the 8th November, 6 months afterwards, the Police officer charged with its execution, made a deposition before the Magistrate, upon which the Magistrate passed this order:—"It is ordered under sections 183 and 184 of Act VIII of 1869 that proclamation be issued calling on these five persons "above-mentioned, to appear in my court "on or before 18th December 1871, and "that all their movable and immovable "property be attached under section 184."

On the same day a proclamation was drawn up by the mohurrir of the court and signed by the Magistrate, requiring Ramkishore Sein amongst others to appear in the Magistrate's Court on the 10th December.

There is an endorsement on the proclamation to this effect:—"This proclamation is forwarded to the Police officer of Division Khurba for service." This is dated the 10th November 1871, and signed Kally Doss Biswas, Court Sub-Inspector.

Then comes a second endorsement,—"Forwarded to Head Constable Tincowry Khan for service. Dated 13th November 1871, signed Madhub Chunder Sanyal, Head Constable—station Khurba."

A third endorsement is received in Mofussil on the 14th November 1871, signed A. Woodeen, Head Constable.

A fourth endorsement runs thus:—

"HONORED SIR,

"On receipt of this proclamation, your humble servant proceeded to the spot, affixed the duplicate at a conspicuous place and informed the heirs of the defendants. The three kyfeuts of the neighbours regarding the same are herewith submitted. Dated the 23rd November 1871, signed by his obedient servant, Tincowry Khan, Head Constable—station Khurba."

The fifth and I believe last endorsement is:—

"HONORED SIR,

"Begs to submit the accompanying papers

"sent in by Head Constable Tinowry Khan, —signed—obedient servant, Madhub Chunder Sanyal, Head Constable."

This somewhat remarkable set of endorsements constitutes all the existing evidence relative to the fact of publication of the proclamation. It refers, as far as I can gather, to publication at Khurba only, and is silent as to any sort of publication at Raipoor, the place where the petitioner resides, and the place to which the proclamation itself describes him as belonging.

The petitioner did not surrender himself before the 10th December. But he did in fact surrender himself, together with two others of the five accused persons, on the 19th December. He was then committed to "hajut." Afterwards from time to time the petitioner was brought up before the Magistrate, and as often remanded, although no evidence had been taken since the date on which the Magistrate originally issued the warrant of arrest, and this continued until the 27th April 1872, when the petitioner and the two other persons applied to the High Court for relief. A Division Bench, consisting of the Chief Justice and Mr. Justice Ainslie, heard the matter and the Chief Justice in giving judgment stated:—"There was not any evidence taken which could be made the foundation of a charge, and the Magistrate appears to have been influenced in the course which he took by the expectation that, after some time and by dint of enquiry, some evidence might be obtained."

The High Court therefore made the order that the last order of remand, namely that of the 26th February, should be annulled.

The consequence of this order was, I believe, that the petitioner and the others were discharged on the 18th May.

In the July following, the petitioner applied to the Magistrate to have the order of attachment, which had been put upon his property simultaneously with the issue of the proclamation on the 8th November, removed. On that application the Magistrate said—"Under all these circumstances I see no reason why the provision of the law as to this attached property being at the disposal of Government should not be carried out, and I order accordingly."

It thus appears that while the petitioner is a freeman with no charge in fact hanging over his head, simply because, as the Chief

Justice phrased it, no evidence has been found to support the original charge made against him, yet as much of his property as could be got at by the Magistrate is, by an order passed by the Magistrate since the petitioner's own release, forfeited to Government. It seems to me that this, certainly, is a startling state of things, to say the least, and very strong grounds are needed in my judgment to prove that it is right.

The Government Pleader has urged upon us that we should not at this stage interfere in the matter, because it is still open to the petitioner to apply under section 185 of the Criminal Procedure Code to have the property restored to him. But as far as I understand the proceedings which have been taken, the application which he made in July last to the Magistrate was in fact an application to have the benefit of the provisions of that very section, and that application has been refused.

Now, on turning back to the commencement of these proceedings, I may take it as being at this time beyond contest, that in order to lay a sufficient foundation for the issue of a proclamation under section 183, and the accompanying order of attachment under section 184, the Magistrate must, upon some sufficient materials, find judicially (that is by an exercise of judicial discretion applied to the consideration of that material) that the person against whom the proclamation is to be issued has absconded or concealed himself for the purpose of avoiding the service of the warrant of arrest previously issued against him. But in this case, according to the record which has been sent up to us, the Magistrate ordered the proclamation to issue without having previously come to any such finding at all. We have, in the official copy of documents laid before us, merely a deposition of a certain Mohima Chunder Ghose, Court Inspector, followed immediately on the same paper by this order:—"It is ordered under sections 183 and 184 of Act VIII of 1869, that proclamation be issued calling on these five persons above-mentioned (that is, I suppose, mentioned in the deposition) to appear in my court on or before, &c." It was distinctly held by Mr. Justice Norman, in the case which is reported in the 73rd page Criminal Rulings of the 6 Volume of the Weekly Reporter, that before the Magistrate can issue the written proclamation under

"section 183, and order the attachment of the property of an accused party who cannot be found; he must be satisfied that such person is absconding or concealing himself for the purpose of avoiding the service of the warrant. The Magistrate should have recorded in his proceedings whether or not he was so satisfied."

I entirely take this view, and I think that until the Magistrate had Judicially found as a fact upon sufficient information that the person against whom the proclamation is to issue had absconded or concealed himself for the purpose of avoiding apprehension under the warrant, he had no authority to issue that proclamation. Not only is it the case that no such finding appears to have been come to by the Magistrate so far as this record speaks, but it seems to me that the deposition of the Court Inspector, if stretched to the utmost, could not possibly in reason be made the ground of a conclusion that Ramkishore Sein was in fact evading the service of the warrant. And the recital, with which the proclamation commences, assuming that it might probably be taken as evidence of the formal finding of the Magistrate, does not carry the matter further; for it merely says—"Whereas it has appeared from the deposition on oath of the Head Constable, Baboo Mohima Chunder, that the above-named defendants have absconded, this proclamation is issued, &c.," and it stops short of stating that the persons named had absconded for the purpose of evading the Magistrate's warrant.

Thus it appears to me that in this case the whole foundation for the attachment and confiscation of the property fails. It is, therefore, not strictly speaking necessary that I should express an opinion on the other points which have been mooted in this application. I think, however, it is right that I should throw out as my own opinion that the period of 30 days, which is prescribed in section 183, as the minimum period within which the person is to be required by the proclamation to appear, was intended by the Legislature to run from the date on which the publication, in the mode prescribed by the same section, should be effected, namely by reading the proclamation publicly in some conspicuous place of the town or village in which such person usually resides, and by affixing it on some conspicuous part of the ordinary place of

such person or on some conspicuous place of such town or village.

If this view be correct, then inasmuch as we have certainly no evidence at all in this case as to when the proclamation was read in the town or village of Raipur where, according to the proclamation itself, the petitioner usually resided, or when it was affixed on some conspicuous part of his ordinary place of abode, it would be impossible for us to infer that he did not, by coming in on the 19th December, come in within 30 days from the date of publication of the proclamation if duly effected in that manner, i. e., within the 30 days as limited by the Act. The Magistrate seems to think that the 30 days should be counted from the date of issuing the proclamation. If this were so, then, as Mr. Woodroffe very rightly pointed out, the proclamation might get into the hands of some subordinate court officer, or even going further than this, into the hands of some local officer for the purpose of being published according to the terms of section 183, and yet might not in fact become published at all within the period of 30 days. It is manifest that even such a delay as has undoubtedly occurred in this case, namely the delay involved in the fact that the proclamation was not published anywhere according to the endorsed returns until some day between the 14th and 23rd November, might be a very serious diminution of the period of 30 days, so far as regards the opportunity for learning of the proclamation and returning, which the Legislature professed to afford to the absconding person.

I will further add that the inclination of my opinion is that the declaration of forfeiture directed to be made in section 184 was intended to be in furtherance of a matter of procedure, and not simply as a mode of punishment for contempt of process, and in this view, I think, that if it is not made before the person affected by the proclamation has come in or has been brought in, it ought not to be made at all; because by that time its purpose has been effected, though even possibly by other means than that of the process which was evaded. It certainly does seem to me that it was a harsh proceeding on the part of the Magistrate to take the opportunity afforded to him by the application made by the petitioner in July for the release of his property for passing long



after all real occasion for it had gone by that order of forfeiture which had not been made before during the time when it possibly would have been expected to serve some purpose.

What is the meaning of the proceeding by which the Magistrate bound the petitioner on the occasion of his making this application in his own behalf, by recognizance to appear from time to time, I have not yet been able to understand. On the face of it, the recognizance does not bind him to meet any criminal charge, and the Government pleader is unable to say whether, in fact, at that time any criminal charge had been preferred against him or not. The papers which are before us ought to contain all that is pending in the Magistrate's Court upon this matter, and they do not disclose a trace of any other criminal charge having been made against the petitioner than that which was made in April 1871 and which had fallen to the ground in consequence of the order passed by this Court in April 1872, and the petitioner's subsequent release from custody.

It seems to me very clear, however, that the attachment and order under section 184 have been made without sufficient grounds in law, and must be set aside.

I regret very much that the proceedings should have shown a continued series of irregularities such as they certainly do show, because I cannot avoid perceiving that these are likely to be interpreted as indicative of personal feeling in an officer who ought to be looked upon by all and who no doubt is free from any such bias.

*Mr. Justice Anslie.*—I think that the order of forfeiture and attachment of the property in this case ought to be set aside on the ground that it has not been shown that the petitioner failed to attend within 30 days of the service of the proclamation issued by the Magistrate under section 183. The procedure laid down in section 183 by publicly reading the proclamation in some conspicuous place of the town or village in which the accused person usually resides,

and by affixing it on a conspicuous part of the ordinary place of abode of such person, or on some conspicuous place of such town or village, seems to me to indicate that it was the intention of the Legislature that the accused person should have the means of deriving information through his family or friends or in some other indirect way when the warrant or the direct order to attend the court cannot be served upon him; and that the legislature has distinctly determined what shall be considered a sufficient time to allow such indirect notice to reach him, and for him to attend the court in consequence of that notice, that time being 30 days. Unless this was the intention of the Legislature, it may very well happen that the accused person should really have no reason to suppose that any proclamation was being issued. In this very case I find that from the issue of the warrant to the issue of the proclamation a very long period expired. If the proclamation had followed immediately on the return to the warrant to the effect that the accused person had absconded, it might be taken as one continuing proceeding for securing the attendance of the accused. But when a long interval is allowed to elapse between the return to the warrant and the issue of the proclamation, I for my own part cannot see how the accused person, who may have gone to a considerable distance at that time, is to be supposed to know that the proceedings have suddenly been revived against him. In this case the petitioner surrendered on the 19th December; and we do not know on what date between the 14th and the 23rd November the service of the proclamation was effected, and I do not think that we should be justified in assuming that the petitioner was not within 30 days of the issue of the proclamation, when he put in his appearance on the 19th December. It must be understood that I have no intention to express dissent from any of the remarks made by my learned brother in this case, but I think it is quite sufficient for me to put the order we propose to make upon the ground which I have indicated.

*Rungpore District.—Continued.*

Names of Magistrates.	Powers with which vested.
Baboo Tarini Persad Roy ...	1st class.
„ Gopal Chunder Dass ...	2nd „
Moulvie Ahmed ...	2nd „
Mr. J. MacCarthy, c.s. ...	3rd „
Baboo Brojo Kant Roy ...	Charge of Bhowanigunge sub-division, with 2nd class powers.
Mr. A. D. Rehling ...	} 3rd class (Honorary).
„ T. Perraux ...	
Baboo Dyal Sing ...	
„ Dukhina Mohun Roy ...	
„ Haris Chunder Roy ...	
Moulvie Jubaluddin ...	
Baboo Mohima Runjun Roy ...	
Moulvie Zahuruddin Abbas Ali Chowdry ...	
Baboo Jogendro Narain Roy Chowdry ...	
„ Junki Bullub Sen ...	
„ Modoo Soodun Banerjen ...	
„ Chunder Mohun Roy ...	
„ Nil Komul Lahori ...	
„ Boirub Dass Doogar ...	

*Bogra District.*

Baboo Madhub Chunder Moitra ...	1st class, and powers under sections 142, 157, 417, and 521.
„ Dwarka Nath Roy ...	3rd class.
„ Govind Kant Bidyabhoosun ...	3rd „

*Pubna District.*

Baboo Kristo Pershad Ghose ...	1st class.
Moulvie Abdul Kurreem ...	2nd „
„ Ameeruddin ...	2nd „
Baboo Amarnath Bhattacharjee ...	3rd „
Mr. P. Nolan, c.s. ...	Charge of Serajgunge division, with 1st class powers and powers under section 222.

## COOCH BEHAR DIVISION.

*Darjeeling District.*

Mr. C. Gouldsbury ...	2nd class.
„ A. W. Paul, c.s. ...	Charge of Terai division, with 1st class powers and powers under section 222.
„ W. Lloyd ...	} 3rd class (Honorary).
„ R. F. Graham ...	
„ J. A. Warnike ...	

*Julpigoree District.*

Mr. M. C. Muller ...	2nd class.
Baboo Dinonath Mookerjee ...	2nd „
„ Krishna Chunder Dass ...	3rd „
Moulvie Tarikullah ...	3rd „ (Honorary).
Mr. E. M. Reily ...	Charge of Fallacotta division, with 1st class powers.



DACCA DIVISION.

*Dacca District.*

Mr. E. S. Moseley, c.s.	...	1st class, and powers under sections 142, 157, 222, 417, and 521.
,, R. F. Rampini, c.s.	...	1st class, and powers under sections 142, 157, 222 417, and 521.
Baboo Parbutty Churn Roy	...	1st class.
,, Brojo Soonder Mitter	...	2nd "
Moulvie Abdool Hye	...	2nd "
Mr. G. Stevenson, c.s.	...	3rd "
,, R. Pereira	...	3rd "
Baboo Poornu Chunder Ghose	...	Charge of Manickgunge division, with 1st class powers and powers under section 222.
,, Kristo Chunder Roy	...	Charge of Moonsheegunge division, with 2nd class powers.
,, Obhoy Churn Bose	...	1st class.
Hon'ble Khaja Abdul Ghuni, c.s.i.	...	2nd "
Khaja Ahsanoolah	...	2nd "
Mr. J. G. Pogose, B.L.	...	2nd "
,, J. G. N. Pogose	...	3rd "
,, A. MacBean	...	3rd "
,, M. David	...	3rd "
Baboo Koylash Chunder Ghose	...	3rd "
,, Radhica Mohun Roy	...	3rd "

(Honorary).

*Backergunge District.*

Mr. J. F. Bradbury, c.s.	...	1st class, and powers under sections 142, 157, 222, 417, and 521.
,, A. W. Cochran, c.s.	...	1st class, and powers under sections 142, 157, 222, 417, and 521.
Moulvie Tujummul Ali	...	1st class.
Mr. B. L. Gupta, c.s.	...	2nd "
Baboo Anund Chunder Sen	...	2nd "
,, Ackhoy Koomar Sen	...	2nd "
Moulvie Mofizuddin	...	2nd "
Baboo Luckikant Roy	...	2nd "
Mr. J. K. Wight, c.s.	...	3rd "
Baboo Hurimohun Sen	...	3rd "
,, Troyluckyonath Sen, B.A.	...	3rd "
,, Umachurn Banerjea	...	Charge of Duckin Shabazpore division, with 1st class powers.
,, Taruknath Mullick	...	Charge of Madaripore division, with 1st class powers.
Moulvie Obedullah	...	Charge of Perozepore division, with 2nd class powers.
Baboo Heeralall Mookerjea	...	Charge of Patooakhally division, with 2nd class powers.
Mr. E. Brown	...	3rd class (Honorary).
,, J. W. Foggo	...	
Baboo Behari Lall Roy	...	
,, Baroda Presonno Chucker- butty	...	
Manomed Fazil	...	
Baboo Chunder Nath Sen	...	3rd class (Honorary).
,, Ramparayun Roy	...	
,, Doorga Churn Ghose	...	

Names of Magistrates.	Powers with which vested.
Meer Abdul Hameed ...	} 3rd class (Honorary).
Rae Gour Chunder Roy, Bahadoor ...	
Moulvie Azizuddin ...	
<i>Furreedpore District.</i>	
Mr. A. J. Fraser ...	1st class.
„ H. Gillon, c.s. ...	2nd „
Moulvie Mahomed ...	2nd „
Baboo Bhoobun Mohun Raha ...	2nd „
„ Jadub Chunder Gossami ...	2nd „
Mr. W. H. Page, c.s. ...	Charge of Goalundo division, with 1st class powers and powers under section 222.

*Mymensing District.*

Mr. T. H. H. Shortt, c.s. ...	1st class.
" J. Pratt, c.s. ...	2nd "
Baboo Chunder Mohun Roy ...	2nd "
Mr. H. J. F. Fasson, c.s. ...	3rd "
Moulvie Mahomed Israil ...	3rd "
Mr. T. A. Donough ...	Charge of Jamalpore division, with 1st class powers.
" E. S. Andrew ...	Charge of Atteah division, with 2nd class powers.
Baboo Kristo Chunder Dutt ...	Charge of Kisoregunge division, with 2nd class powers.
" Kashi Kishore Roy ...	2nd class. }
" Peari Mohun Roy ...	3rd " }
" Soorjokant Acharji ...	3rd " }
" Dewan Subandal Khan ...	3rd " }
Mr. W. B. Manson ...	3rd " }
Baboo Hur Chunder Chowdry ...	3rd " }
" Ramkishore Acharjee ...	3rd " }
" Dinonath Chuckerbutti ...	3rd " }

(Honorary).

*Sylhet District.*

Mr. J. Anderson, c. s. ...	1st class and powers under sections 142, 157, 222, 417, and 521.
" J. Postford, c. s. ...	1st class.
" S. N. Banerjea, c. s. ...	2nd "
Abdool Guffoor ...	2nd "
Baboo Hurokali Mookerjea ...	2nd "
Mr. W. G. Black ...	2nd "
" A. C. Mackertich ...	3rd "
Hamid Bukht Moozoomdar ...	3rd "

*Cachar District.*

Mr. W. K. Clementson ...	1st class.
Baboo Ramgobind Deb ...	2nd "
Mr. W. C. Loraine ...	3rd "
" H. H. Metcalfe ...	Charge of Hylakandy division with 1st class powers and powers under section 222.

CHITTAGONG DIVISION.

*Chittagong District.*

Mr. H. Mosley, c. s. ...	} 1st class, and powers under sections 142, 157, 222 417, and 521.
" J. Whitmore, c. s. ...	
" W. Sarson ...	1st class.

Names of Magistrates.	Powers with which vested.
Baboo Jugobundo Sen	... 2nd class
" Nobinchunder Sen	... 2nd "
Mr. H. B. Beams	... 2nd "
" W. R. Johnston	... 2nd "
" J. Nugent, c. s.	... 3rd "
Baboo Huri Choitanno Ghose	...
" Ishwar Chundra Bose	...
" Lal Chand Chowdry	... } 3rd class (Honorary).
" Ram Pershad Hajari	...
" Seo Pershad Sookool	...

#### *Noakhally District.*

Mr. J. Newbery, c. s.	... 1st class and powers under sections 142, 157, 222, 417, and 521.
Baboo Dwarkanath Banerjea	... 2nd class.
" Goluck Chunder Roy	... 2nd "
Mr. W. Davey	... 3rd "

#### *Tipperah District.*

Mr. F. W. R. Cowley, c. s.	... 1st class, and powers under sections 142, 157, 222, 417, and 521.
Baboo Kalipershad Sen	... 2nd class.
Moulvie Anwaruddin	... 2nd "
" Ramaizuddin	... 2nd "
Baboo Kalinath Bose	... 3rd "
" Kalinath Dey	... 3rd "
" Bhingwan Chunder Bose	... Charge of Brahmanberriah division, with 1st class powers and powers under section 222.
Mr. E. Delanney	...
Baboo Ramdulal Roy	... } 3rd class (Honorary).

#### PATNA DIVISION.

##### *Patna District.*

Mr. C. F. Worsley, c. s.	... 1st class, and powers under sections 142, 157, 222, 417, and 521.
Moulvie Duliluddin	... 1st class.
Baboo Chunder Sikhur Banerjea	... 1st "
Moulvie Zanuddin Hossein	... 2nd "
Colonel Emerson	... Charge of Dinapore division, with 1st class powers and powers under section 222.
Mr. J. White	... Charge of Barh division, with 2nd class powers.
Baboo Bemola Churn Bhuttacharjea	... Charge of Behar division with 2nd class powers.
Moulvie Vilait Ali Khan	...
Mir Shamsool Hoda	...
Koonwar Sukraj, Bahadoor	...
Rai Jaikishen	...
" Doorga Pershad	...
" Sohan Lall	... } 3rd class (Honorary).
Baboo Modun Mohun Lall	...
Mahomed Nowab	...
Major Hidayat Ali Khan	...
Shah Amyud Hossein	...

##### *Gya District.*

Mr. G. L. T. Harris, c. s.	... 1st class, and powers under sections 142, 157, 417, and 521.
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Names of Magistrates.	Powers with which vested.
Mr. F. H. Elphinstone	1st class.
Moulvie Ali Hossein	2nd "
" Azharul Huq	2nd "
Baboo Dhonesh Chunder Rai	3rd "
Moulvie Syud Ameer Hossein	Charge of Nowadah division, with 1st class powers.
Mr. J. A. Bourdillon, c. s.	Charge of Jehanabad division, with 2nd class powers.
Baboo Jadub Chunder Ghose	Charge of Arungabad division, with 2nd class powers.
Maharaja Sir Joy Prakash Sing Bahadoor, k. c. s. i.	2nd class (Honorary).
Shahabad District.	
Mr. C. H. Vowell, c. s.	1st class, with powers under sections 142, 157, 222, 417, and 521.
Baboo Pertap Chunder Chatterjea, B. L.	1st class.
" Hur Sahai Sing	2nd "
" Medini Pershad Sing	3rd "
Mr. J. Scobell Armstrong, c. s.	Charge of Buxar division, with 1st class powers and powers under section 222.
" J. E. A. Eyre	Charge of Sasseram division, with 1st class powers.
Moulvie Villayut Hossein	Charge of Bhubooa, with 2nd class powers.
Maharajah Moheswar Bux Sing, Bahadoor	} 3rd class (Honorary).
Mr. G. Miller	
Baboo Rajnath Pershad	
Moulvie Buksh Khan	
Baboo Baijnath Sahi	
Mr. Charles Fox	
Baboo Joy Prakash Lall	
" Hurihur Churn Sing	
Ashruf Ali Khan	
Mr. W. Newland	
Maharaj Suraj Bhan Sing	
Baboo Kunker Sing	
Sheo Sunker Sing	
Donur Nath Sing	
Sheikh Mozuffer Hossein	
Hurnath Sing	
Dewan Ram Coomar Sing	
Syud Mahomed Jaffir	
" Imdad Hossein	
Moharaj Koowar	
Bachun Singh	
Imrit Lall	
Dr. N. Jackson	
Mr. McArthur	
Tirhoot District.	
Mr. H. W. Gordon, c. s.	1st class, and powers under sections 142, 157, 222, 417, and 521.
Munshi Ishri Pershud	2nd class.
Baboo Uma Churn Bose	2nd "
Mr. J. S. Armstrong, c. s.	Charge of Hajipore division, with 1st class powers and powers under section 222.

Names of Magistrates.	Powers with which vested.
Mr. J. Crawford, c.s.	... Charge of Durbanga division, with 1st class powers and powers under section 222.
„ A. Forbes, c.s.	... Charge of Tajpore division, with 1st class powers and powers under section 222.
„ W. O. Reilly	... Charge of Sectamurhi division, with 1st class powers and powers under section 222.
„ J. Barlow, c.s.	... Charge of Mudhoobani division, with 2nd class powers.

Mohun Thakur	...
Bishen Deo Narain Sahi	...
Purmeshwar Pershad Narayun Sing	...
Chowdhry Roodde Pershad	...
Mr. A. Tripe	...
„ G. Anderson	...
„ M. J. Wilson	...

3rd class (Honorary).

*Sarun District.*

Mr. G. G. Dey, c.s.	... 1st class, and powers under sections 142, 157, 222, 417, and 521.
„ A. C. Tutu, c.s.	... 2nd class.
Baboo Shital Nath Bose	... 2nd „
Mr. A. C. Wright	... Charge of Sewan division, with 1st class powers.
Moulvie Izharuddin	... 3rd class.
Mr. J. G. S. Hodgkinson	... 1st class, and powers under section 222 (Honorary).
Maharaja Rajendra Protap Sahi,	...
• Bahadoor.	...
Shah Ahmed Hossein	...
Vice-Chairman of Municipality	...
Dr. C. M. Russell	...
Mr. W. A. Anly	...
Dev Coomar Sing	...
Moulvie Abdul Hye	...
Narendro Pertap Sahi	...
Kishna Pershad Sahi	...

3rd class (Honorary).

*Chumprun District.*

Mr. C. A. Samuells, c.s.	... 2nd class.
Baboo Luchmee Narain	... 3rd. „
Mr. C. E. Bailey	... Charge of Bettiah division, with 2nd class powers.
„ A. Tripe	...
„ H. Hollway	...
Maharaja Rajendra Kishore Sing ...	... 3rd class (Honorary).

## BHAUGULPORE DIVISION.

*Monghyr District.*

Mr. T. J. C. Grant, c.s.	... 1st class, and powers under sections 44, 142, 157, 222, 417, and 521.
Moulvie Abdool Jubber	... 1st class.
Mr. E. M. Money, c.s.	... 2nd „
„ J. A. Craven	... 2nd „
„ M. Little	... 2nd „
„ F. J. G. Campbell, c.s.	... Charge of Jamaie division, with 1st class powers and powers under section 222.

Names of Magistrates.	Powers with which vested.
Mr. C. A. Wilkins, c.s.	... Charge of Begoo Serai division, with 2nd class powers.
Maharaja Sir Joy Mungul Sing, Bahadoor, K.C.S.I.	2nd class (Honorary).

*Bhaugulpore District.*

Mr. T. T. Allen, c.s.	... 1st class, and powers under sections 142, 157, 222, 417, and 521.
„ F. W. Badcock, c.s.	... 1st class.
Baboo Poran Chunder Newgy	... 2nd „
„ Pearl Mohun Banerjea	... 2nd „
Mr. G. C. M. Smith	... Charge of Soopool division, with 1st class powers.
„ W. B. Martin	... Charge of Mudheepoorah division, with 2nd class powers.
Moulvie Mohamed Ishaq	... Charge of Banka division, with 2nd class powers.

*Purneah District.*

Mr. F. Wyer, c.s.	... 1st class, and powers under sections 142, 157, 222, 417, and 521.
„ F. J. R. Walker	... 1st class.
Baboo Srinath Bhudder	... 3rd „
„ Rajoninath Chatterjea	... 3rd „
Mr. J. C. Veasey, c.s.	... Charge of Kishengunge division, with 1st class powers and powers under section 222.
„ H. Rattray	... Charge of Arrareah division, with 2nd class powers.
„ C. Shillingford	... 2nd class. (Honorary).

*Sonthal Pergunnahs District.*

Mr. C. W. Wilmot	... Charge of Rajmehal division, with 1st class powers and powers under section 222.
„ W. M. Smith	... Charge of Doomka division, with 1st class powers and powers under section 222.
„ J. F. Blumhardt	... Charge of Deoghur division, with 1st class powers and powers under section 222.
„ C. A. S. Bedford	... Charge of Godda division, with 2nd class powers.
„ J. D. White	... 2nd class.
„ L. B. Roberts	... 2nd „
„ J. R. Hand	... 2nd „
„ R. H. Boddam	... 3rd „
„ R. C. Hamilton	... 3rd „

ORISSA DIVISION.

*Cuttack District.*

Mr. V. Irwin, c.s.	... 1st class, and powers under sections 142, 157, 222, 417, and 521.
„ R. H. Greaves, c.s.	... 1st class.
Baboo Jugo Mohun Roy	... 1st „
Mr. W. H. M. Gun, c.s.	... 2nd „
Baboo Aunoda Pershad Ghose	... 2nd „
„ Barodakant Mojoomdar	... 2nd „
Mr. Sham Chand Nath	... 2nd „
„ C. F. Manson	... 2nd „
„ G. H. Atkinson, c.s.	... 3rd „
Moulvie Abdul Cadir	... 3rd „

Names of Magistrates.	Powers with which vested.
Baboo Hurro Chunder Ghose	... Charge of Kendrapara division, with 1st class powers and powers under section 222.
„ Umbica Churn Roy Chowdry	... Charge of Jajipore division, with 2nd class powers.
Mr. J. F. Harrison	... Charge of Jugutsingapore division, with 2nd class powers.
Baboo Puddalab Deb	... 3rd class. (Honorary).
<i>Poores District.</i>	
Mr. J. F. Stevens, c.s.	... 1st class, and powers under sections 142, 157, 222, 417, and 521.
Baboo Kedarnath Dutt	... 2nd class.
„ Nundkishore Dass	... 3rd „
Moulvie Ikram Russool	... 3rd „
Mr. W. C. Taylor	... Charge of Khoordah division, with 1st class powers and powers under section 222.
<i>Balasore District.</i>	
Mr. J. R. Hallett, c.s.	... 1st class, and powers under sections 142, 157, 222, 417, and 521.
Baboo Dwarkanath Sen	... 2nd class.
„ Otool Chunder Chatterjea	... 2nd „
Mr. W. Fiddian, c.s.	... Charge of Bhuddruck division, with 1st class powers and powers under section 222.
Baboo Koylash Chunder Roy, Mahashoye	... 3rd class ... } (Honorary).
„ Nemye Churn Bose	... 3rd „ ... }
Mr. A. G. Wilson	... 1st class, and powers under sections 142, 157, 222, 417, and 521.
Captain W. L. Samuells	... 1st class.
Baboo Gunganund Mookerjea	... 2nd „
Moulvie Fuzeelut Hossein	... 2nd „
Baboo Parbutty Coomar Mitter	... 2nd „
Mr. T. E. Dempster	... 3rd „
Baboo Raj Gopal Rai	... 3rd „
Mr. W. N. Campbell	... Charge of Pachumba division, with 2nd class powers.
„ M. Leibert	... 3rd class ... } (Honorary).
„ J. F. Cockburn	... 3rd „ ... }
<i>Lohardugga District.</i>	
Captain N. Lowis	... 1st class, and powers under sections 142, 157, 222, 417, and 521.
I.A. L. J. H. Grey	... 2nd class.
Munshi Sadanund	... 3rd „
Moulvie Guzunffer Ali	... 3rd „
Mr. L. R. Forbes	... Charge of Palamow division, with 1st class powers.
Baboo Nilmadhub Bundopadhya	... 2nd class.
Lal Opendronath Sahi	... 3rd „ } (Honorary).
Rai Kishendyal Sing, Bahadoor	... 3rd „ }
<i>Singbhoon District.</i>	
Dr. O. J. Manook	... 2nd class.
Raja Chackudhur Sing Deo, Bahadoor	... 2nd „ ... } (Honorary).
Thakur Rughonath Sing, Rai Bahadoor.	... 2nd „ ... }

*Maunbhoom District.*

Names of Magistrates.	Powers with which vested.		
Captain C. H. Garbett	...	1st class, and powers under sections 142, 157, 222, 417, and 521.	
" W. Hopkinson	...	Ditto	ditto ditto
Lt. W. A. Holcombe	...	2nd class.	
Mr. R. D. Hare	...	2nd "	
Baboo Nobin Chunder Pal	...	2nd "	
" Nundo Coomar Aykat	...	2nd "	
" Kisto Pershad Chowdry	...	2nd "	
" Judoonath Chowdry	...	3rd "	
Mr. H. W. Mackenzie	...	Charge of Govindpore division, with 2nd class powers.	
Baboo Rasbehari Lall Sing	...	3rd class ...	} (Honorary).
" Kassinath Sing	...	3rd " ...	
Mr. J. M. G. Cheke	...	3rd " ...	

## ASSAM DIVISION.

*Gowalpara District.*

Baboo Poornanund Surma Borooh	1st class.	
" Paddolochun Dass	...	2nd "
" Hurish Chunder Chaki	...	2nd "
Mr. P. H. Scanlan	...	} 2nd class. (Honorary).
Baboo Pritharam Chowdry	...	
Rai Protap Chunder Borooh Bahadur	...	

*Kamroop District.*

Mr. W. R. Davies	...	2nd class.	
" R. Cornish, c.s.	...	2nd "	
Baboo Gunganath Surma	...	2nd "	
" Denonath Surma	...	2nd "	
" Kurnamoye Banerjea	...	2nd "	
Mr. A. C. Campbell	...	Charge of Burpettah division, with 1st class powers and powers under section 222.	
Mr. W. Becher	...	3rd class ...	} (Honorary).
Baboo Jugosen Das Chowdry	...	3rd " ...	
Colonel Campbell	...	3rd " ...	
Shekail Hossein	...	3rd " ...	
Baboo Gopal Chunder Banerjea	...	3rd " ...	
" Mansing Mojomdar	...	3rd " ...	
" Gobind Ram Mojomdar	...	3rd " ...	
" Chanaram Kant Mojomdar	...	3rd " ...	

*Durrung District.*

Mr. R. A. Fisher	...	2nd class.
" R. Lea	...	2nd "
Baboo Hurkant	...	2nd "
" Luckinath Surma	...	2nd "
" Futtick Chunder	...	2nd "
Mr. H. W. Ellis	...	2nd "



Names of Magistrates.	Powers with which vested
Captain M. O. Boyd	... Charge of Mungledye division, with 1st class powers and powers under section 222.
Mr. G. Leslie	.. 3rd class ...
„ F. T. Severien	... 3rd „ ...
Raja Bolundro Narain	... 3rd „ ...

(Honorary).

*Nowgong District.*

Baboo Gbonabhiram Surma Borooah	2nd class.
Mr. H. M. Hinde	... 2nd „
Baboo Champak Narain	... 3rd „
Mr. J. Herriot	... 3rd „ ..
„ T. Henderson	... 3rd „ ..
„ E. Tye	... 3rd „ ..

(Honorary).

*Seobsaugor District.*

Major W. H. Lance	... 1st class, and powers under sections 112, 157, 222, 417, and 521.
Captain W. G. Maitland	.. 2nd class.
Mr. A. Borooah, c. s.	.. 3rd „
Baboo Gunga Govind Surma	.. 2nd „
Mr. P. T. Carnegie	... Charge of Jorehaut division, with 1st class powers and powers under section 222.
Captain L. Blathwayt	... Charge of Golaghat division, with 1st class powers and powers under section 222.
Baboo Shib Pershad Chuckerbutty	... 3rd class
Mr. H. L. Jenkins	.. } 3rd „ (Honorary).
„ R. Spiers	.. }

*Luckimpore District.*

Baboo Huro Nath Ghose	.. 2nd class
„ Raj Mohun Dé, B. L.	.. 2nd „
Lt. W. A. Lawrence	... 3rd „
Captain A. N. Phillips	.. Charge of North Luckimpore division, with 1st class powers and powers under section 222.
Mr. H. M. S. Hannay	.. 3rd class ...
Rev. E. H. Higgs	.. 2nd „ ..
Mr. J. W. Watson	... 2nd „ ...
„ W. G. Wagentrieber	.. 2nd „ ..
„ H. L. Michel	... 2nd „ ..

(Honorary).

A. MACKENZIE,

*Offy. Secy to the Govt. of Bengal*

# THE LAW OBSERVER.

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[No. 4.]

*Selections from the Records of the Government of India—Minute by the Hon'ble FitzJames Stephen on the Administration of Justice in British India, 1872.—(Contd.)*

In the fourth Chapter of the minute before us, Mr. Stephen discusses the question whether any, and what, special training should be provided for officers who are to fill judicial situations.

The subject was mooted as early as 1836, and it is rather now late in the day to have two opinions upon it.

Mr. Howard, the Director of Public Instruction at Bombay, addressed a letter in 1859 to that Government in which occurs the following sentence :

"The time is fast coming when lawyers trained in this country will be procurable in such numbers and possessed of such professional attainments and practical experience as to constitute a formidable body of rivals to the untrained Judges of the Civil Service."

To guard against this contingency Mr. Stephen would fain train the civil servants as lawyers. But then their knowledge of law is to be confined to what he is pleased to call the Anglo-Indian Law, as if a knowledge of that law alone was sufficient to turn out good and efficient Judges.

"When we have already," says he, "an excellent body of codified law in full operation in India, which Indian Civilians must of necessity learn, it seems hardly necessary to look further for the materials for a good legal education."

Now, there is not a civilian nor any other judicial officer in the country who is not quite familiar with the Acts of the Supreme and other Governments, and yet, we should like to know, how many of

those gentlemen, who have not been trained as Barristers or Advocates, may properly be considered to be good or sound lawyers. The civilians, who have not had the benefit of a legal education in any part of the United Kingdom of Great Britain and Ireland, are admitted on all hands to be but indifferent judicial officers, and scarcely on a par, so far as their legal attainments are concerned, with the trained vakeels of their own Courts. To what is this result to be attributed? They are quite *au fait* at the Regulations and the Acts, and in spite of their knowledge of those extraordinary embodiments of legal sapience, they *are* what they are freely admitted on all hands to be, we do not exactly understand how Mr. Stephen means to convert them into better Judges by utilizing, we fancy, the very same knowledge which they already possess. This, we fear, is anything but reasonable. Unless judicial officers are trained in the *principles of law*, a mere knowledge of a few rules, got up mechanically, is all but adequate to the requirements of an efficient administration of justice.

Mr. Stephen then gives a succinct analysis of the Anglo-Indian Law, and points out the advantages of codification.

He adverts next to the decisions of the High Courts, the majority of which, in his opinion, are not worth reporting.

He says, "Thus the High Court of Calcutta is divided into Division Courts of two Judges each. All their judgments are published just as they are delivered, generally without a proper statement of facts to render them intelligible. Without any disrespect to the Court, it is surely clear that to convert every judgment so delivered into a binding precedent, that is to say, into a law, is to attach to them a degree of importance which they are far from deserving."

If the decisions of the Judges of the highest Court of appeal in the country are not to be used as precedents, we can hardly see the propriety of retaining them in office at such an enormous expenditure to the State. Evidently, Mr. Stephen would fain insinuate that such decisions are worthless. If there is any truth in this opinion, the sooner the present state of things ceases to exist, the better for the country.

Again, Mr. Stephen says, that

"Some of the most distinguished of them (the Judges of the High Court) have expressed themselves to me most strongly as to the mischief which is done by the enormous multiplication of reports, the indiscriminating manner in which they are accepted as authority co-ordinate with that of Acts of the Legislature, and the very poor quality of many of the reports. They have told me in particular that the effect of this state of things upon the Native bar is peculiarly bad. The Native pleaders and vakeels are said to have plenty of quickness and excellent memories, but to be wanting in power and grasp of understanding. On persons of this temper a vast mass of precedents is apt to produce a most injurious effect. It diverts their minds from the object of obtaining any real comprehensive knowledge of law to that of amassing a number of isolated unconnected rulings with which they can pelt their antagonists."

Here is an admission of "The poor quality of many of the High Court reports" by some of the Judges of the Court. In what the poverty consists, whether in the manner in which the reports are drawn up, or in the knowledge of the law possessed by the judges, we are not told. It may however be safely inferred from the context that this poverty lies in both. We are quite sure the vakeels are fully aware of this, and if they cite these reports as authorities, in any case, in support of their contention, it is not so much from a high opinion of their value as expositions of the law, as from a belief in the likelihood of their being accepted as binding precedents by the

Judges. They are however seldom wrong in their calculations. Surely, they are in duty bound to support their cases by all manner of authority they can afford to collect, and if the law as laid down by the Judges of the High Court is not to be taken as a guide, we hardly know what other authority can be safely referred to with greater confidence. We should like to know whether these "poor reports" are not cited as authorities by the barristers in support of their contentions. So far as we are aware, we have seen such cases relied on as well by barristers as by vakeels, and therefore we are too obtuse to understand how the injurious effect of these decisions tells only upon the Native vakeels in particular. We thought that the old metaphysical doctrine, to which Alexander Pope attempted to give currency by the celebrated couplets which every school boy knows by heart, had long been exploded. We wonder how Mr. Stephen attempted to revive it in the latter half of the 19th century, and restrict its application to "the native pleaders and vakeels" only. We can assure Mr. Stephen that he need be under no anxiety on their account. There is not the slightest chance of their being misled by any decisions, however much they may attempt to make use of them against their antagonists.

Mr. Stephen would publish only a few select reports. These he divides into

1. Cases upon written law.
2. Cases upon unwritten law.

By cases on written law he means "cases deciding questions as to the meaning of Acts of parliament, Acts of the Government of India, or Acts of the Legislatures of Bengal, Madras and Bombay." Mr. Stephen does not define what he means by cases upon unwritten law, but it would appear that all other cases than those which turn upon the Acts are included in this category.

All cases upon written law Mr. Stephen considers to be in effect, amendments of the statutes to which they refer, and as he "fully appreciates the importance of the Judges as an important branch of

the Legislature (which they unquestionably are and must always continue to be) he wishes their legislation to be set on as satisfactory a footing as possible, and to have full justice done to it." Acts accordingly are to be amended in conformity with the decisions of the High Court.

According to Mr. Stephen "an annual amending Act with the help of re-enactments at proper intervals, would dispose of all the cases upon the written law." Cases upon unwritten law it is not so easy to dispose of, so Mr. Stephen suggests the following remedy:

1. No reports whatever of cases decided in India after a certain date, should be permitted to be quoted as authorities in any Court of Justice except the statements and reports hereinafter referred to.

2. The Government should be authorized and required to publish half-yearly statements of such of the points of law decided by the Judges of the High Courts as they thought right.

3. No statement should be published unless it was signed by a certain number at least of the High Court Judges. The number should be so arranged that more than one High Court should be represented, and that, say, three Judges should warrant each statement.

4. Government should be empowered to ask the Judges questions suggested, but not decided, by actual cases, and the Judges required to state the law in answer to such questions.

5. Such statements of the law should have the same authority as a Full Bench Ruling of a High Court.

Mr. Stephen is certainly entitled to great credit for originality. Never was a scheme more novel or fantastic. In India every theorist in place attempts to carry his crude notions into practice. If the experiment succeeds, all right, if not, it is only at the expense of the Natives for whom no body cares a farthing. Mr. Stephen may for aught we know be in advance of his contemporaries; but he ought to persuade his own countrymen in the first instance to adopt his scheme,

and after it has answered well in England, it may be imported into India for the benefit of its benighted inhabitants.

Mr. Stephen suggests, that

"A certain number of the candidates who succeeded at the competitive examination, say two or three in each year, might be allowed to remain in England till they were called to the bar. They would be both barristers and civilians. On their arrival in India they should be appointed Deputy Government Advocates and public prosecutors, and should be bound, in consideration of their pay, to take up all Government cases both civil and criminal. On the other hand, they might be allowed to take private practice as Civil Surgeons do."

This is surely a very good plan, and if carried out, would certainly raise the tone of the Civil Service. We would, however, propose by way of amendment that instead of two or three passed candidates, as many as chose to study for the Bar might be encouraged to do so.

Mr. Stephen proposes also to throw open the District and Sessions Judgeships to practising lawyers both European and Native. This, we think, is the best means that may be adopted to improve the administration of Justice. Mr. Stephen, however, would not give the same salary to the Native Judge that he would pay to the English Judge, simply because the former is a Native of the country, where living is much cheaper than in England. We do not think it necessary to combat so foolish a proposition as this, as by that process we would be attaching to it a degree of importance which it does not deserve. Apart from other considerations, does Mr. Stephen know that in India the amount of salary a person draws is considered to be the measure of his ability? And if the distinction he recommends is really made, the inevitable result will be that no body will have that respect for the dignity of the Native Bench which it is absolutely necessary it should command.

Mr. Stephen addresses himself next to the task of determining the question:

"Does the system of Criminal and Civil Procedure require any modification," and the result he arrives at is what might be fairly expected.

The main and characteristic feature of Indian adjective law being "the extreme latitude of appeal which it permits and the system of supervision with which that of appeal is interwoven," Mr. Stephen first points out the evils as well as the advantages of this system, and then proceeds to a consideration of the salient provisions of the Codes of Criminal and Civil Procedure. The system of Criminal Procedure as constituted by Acts XXV of 1861 and Act VIII of 1869 having been superseded by Act X of 1872, we do not think it necessary to advert to such portions of Mr. Stephen's remarks as relate to that system, although the main features of the old Code are retained in the new, with the addition of certain obnoxious provisions on which we commented sometime ago. We have, therefore, to deal only with Act VIII of 1859. Mr. Stephen describes the machinery now at work in the different parts of the country for the administration of justice, and in passing touches upon a variety of points more or less connected with the subject. He would have local Courts for the Presidency towns upon the basis of the late Supreme Courts;—these being "exceptional institutions for an exceptional population" with no jurisdiction at all out of those towns except Admiralty Jurisdiction. The High Courts in his opinion ought to be mere Courts of Appeal, and should be open to civilians, barristers, and pleaders indiscriminately.

The Civil Procedure Code contains provisions for two classes of Appeals, namely, Regular and Special. In Regular or first appeal, the whole case being open, the appellate authority disposes of all questions of law and fact which arise in it.

The special appeals are only partial appeals, that is appeals in which the jurisdiction of the Appellate Court to entertain them is limited only to questions of law involved in them.

Now, let us examine the opinions of the Judges of our High Court on the subject of these Appeals. Sir Barnes Peacock, the late Chief Justice, proposed to abolish Special Appeals altogether. Of 3047 Special Appeals preferred in 1869, the value in cash was as follows :

	Rs.	Rs.
147 cases under	5	0
175 " above	5	under 10
753 " "	10	" 50
468 " "	50	" 100
403 " "	100	" 250
538 " "	250	" 500
266 " "	500	" 1,000
297 " "	1,000	

Sir Barnes observes, "These figures show 1,543 under Rs. 100, 941 above Rs. 100, and under Rs. 500, or a total of 2,484 under Rs. 500; 266 above Rs. 500 and under Rs. 1,000 or a total of 2,750 under Rs. 1,000."

He observes "I have not been able to make any accurate calculation of the amount of public money which each Special Appeal costs; but I feel confident that taking an average, the cost of each Special Appeal, including salaries of Judges and of various members of the establishment employed on the case from first to last, cannot be estimated at less than Rs. 100 to Rs. 120, involving a cost to Government, as regards Special Appeals of upwards of 3 lakhs a year."

"It must be evident that in a very large number of cases, I would say as regards the whole 1,543 Special Appeals under the value of Rs. 100 each, it would be cheaper to Government to pay the full amount of the appellant's demand with the costs of both parties, and to give each a bonus for terminating the litigation than to support an establishment, such as the High Court, for deciding such differences.

"The Lower Court may come to wrong decision, upon the facts as well as upon the law of a case. There is no sound principle upon which an establishment ought to be kept for correcting errors in Law, when errors as to the facts remain undressed."

Mr. Justice Loch says,—“So long as the present system of Appeals continues, the work of the Court is not likely to be reduced much lower than at present.”

He adds “that the mode in which special appeals are disposed of shows that the defect of investigation, if there be any, does not principally lie in the finding on a point of law, but on a finding of fact which the Court cannot correct in Special Appeals. \* \* \* \*

“Many of the persons who come up to this Court do not understand the nature of a special appeal. They think it very hard that the highest Court of appeal in the land will not look into the evidence or try the facts of the case; they evidently come up thinking that the High Court must do justice or at least will hear the whole case over again.”

Sir Charles Hobhouse says: “Now what satisfaction can a judicial system, such as I am about to describe, give to a native of this country?

“A Subordinate Judge, a Native of the country, acquainted thoroughly and from his earliest days with the language and manners, habits and thoughts of the people, educated it may be to the law, trained to it to some extent certainly, and holding his high post by reason of his efficiency, hears and sees a witness to depose, comes to an opinion upon his credibility, relative or positive, and gives judgment accordingly.

“An appeal lies to the district Judge. He has had no better, if so good, legal training as the first Judge; he has not had the benefit of seeing or hearing the witness depose, he would not naturally be so good a Judge of his credibility, if he had seen or heard him, but he has nevertheless jurisdiction to come, unassisted by any other Judge, to a different opinion on the question of the credibility of the witness. On that question it usually is, that the whole case turns, and on that question his judgment is final.

“If that judgment is for the reversal of the decision of the first Judge, can it possibly give anything but dissatisfaction to the public generally?”

Justice Louis S. Jackson says:—“I must now state my views as to the mode of strengthening the inferior Courts, and as to the constitution and functions of these Courts. I conceive that there ought to be of two grades only, (1) The Moonsiffs's Courts, and (2) the District Courts. The Moonsiffs ought to be restricted to the trial of suits for money or moveable property, the limit as to jurisdiction being somewhat enlarged, say to Rs. 2,500, and their decisions up to Rs. 50 ought to be final, as far as appeal is concerned, but subject to revision by the District Court.

“Suits for immovable property or involving any interest in such property as well as suits relating to adoption, inheritance, marriage, or the like, should be commenced only in the District Court. I rest this proposal far less on the ground of unfitness in the Moonsiffs themselves, than on the absence at Moonsiffs' stations generally, of pleaders or other legal advisers, who are competent to assist the Court or guide the parties; and in some degree on the circumstances in which the Moonsiffs exercise their functions \* \*

“And this brings us to the District Court, which ought to take so important a part in the administration of justice, and which as a Civil Court falls so far short of what it should be. Displaced by the Subordinate Judge in the trial of original suits, overshadowed by the High Court in Appellate jurisdiction, the Zillah Judge takes only a secondary share in the administration of Civil Justice, and perhaps at present his most useful function is that of superintendence of the inferior Courts; and this can only be well done where the Judge possesses experience and energy, and is not over-much pressed with other duties of detail. \* \* \*

“It is right to say that apart from considerations of economy there is another reason which I confess has great weight with me in favour of reducing the High Court to a less number of Judges. It is this: The concurrent and unceasing delivery of numerous unconsidered judg-

ments by many Judges, all entitled to equal respect, tends in some degree to confusion, to diversity of decision on the worse points, and consequently to a diminution of the prestige and authority of the Court. The judgments of the High Court to be useful in the degree expected of them, must, it seems to me, be comparatively few, thoroughly well-considered, pronounced by a sufficient number of voices after sufficient argument. At present, excepting what are called Full Bench cases, hardly any of our decisions answer this description. The Court is a kind of mill into which thousands of cases are cast and a considerable pressure being applied to the turning of many wheels, the cases come out ground certainly, but without that sifting which is required for discrimination of the different grains. I think too, most people are now afraid,—in fact, I never hear an opinion to the contrary—that the experiment of making the local business of Calcutta a branch of the business of the High Court has not succeeded, and that at least the civil business should be taken by a separate local Court."

Mr. Justice Jackson would allow appeal in four cases only:—

(1.) Where an appeal is permitted to the Queen in Council, there must first be an appeal to the High Court.

(2.) Where the Appellate Court has reversed the judgment of the Court of first instance, there should be a further appeal.

(3.) Where a Court consists of more Judges than one, and the Judges differ, there should be an appeal.

(4.) Where the case is certified to be a fit one for appeal by some one of a limited number of pleaders or advocates specially empowered by the Court to give such certificates.

Mr. Justice Phéar says:—

"The first step to be taken by a disappointed suitor to get the judgment of the first Court corrected, is, as I have already mentioned, a regular appeal, and by the Civil Procedure Code, the Appeal Court is expressly forbidden to

remand the case for trial except when it has happened that "the Lower Court has disposed of the case upon a preliminary point so as to exclude any evidence of fact which appears to the Appellate Court essential to the rights of the parties, and the decree of the Lower Court upon such preliminary point is reversed by the decree in appeal." Unless this has occurred the Appeal Court must try the case itself upon the material sent up to it, however imperfect and valueless that may be, though with a limited power no doubt, under some circumstances of causing this to be supplemented by additional evidence. But clearly a power of this kind is altogether insufficient to meet the evil; for I may reiterate that, generally speaking nothing short of a new trial can remove the mischief to which a bad trial gives rise. It is impossible, for example, without a fresh examination, to say into what form such evidence as that which I have hypothetically quoted, would be transmuted by a proper process of questioning.

On the subject of special appeals, Mr. Justice Phéar says, "if the suit is of the lower-valued class, the party aggrieved by the decision of the Appeal Court has still another chance open to him. He may appeal specially to the High Court "on the ground of the decision being contrary to some law or usage having the force of law, or of a substantial error or defect in law in the procedure or investigation of the case which may have produced error or defect in the decision of the case upon the merits and on no other ground." These words of the Legislature do not leave its meaning altogether without obscurity; and it is curious that no legislative direction is anywhere given as to the course which the High Court should take when satisfied that any one of the grounds mentioned is made out. In extreme cases, the High Court has, I believe, on special appeal, gone so far as to direct a new trial in the first Court, when the Lower Appellate Court could not have lawfully done so. And



obviously in any such case the regular appeal represented so much time and money thrown away. Generally however the High Court considers itself bound to confine itself to controlling and directing the action of the Lower Appellate Court, with the view to secure, as far as may be, that in the determination of fact, that Court shall exercise a judicial discretion upon the materials properly brought before it, by the record of the first Court, and in the other modes provided by the Civil Procedure Code.

"And when the findings of fact come to by the Lower Appellate Court cannot be impeached for want of such discretion, then the High Court passes such judgment as those findings warrant in law. But I may venture, without risk of contradiction, to say that the cases are very frequent in which the High Court sees either that the evidence before the Appellate Court does not fully exhibit the relation between the parties and the facts of the matter in dispute, or that the Lower Appellate Court, in the exercise of its discretion has differed from the first Court in its view of the fact for no apparent reasons or for reasons which are unsatisfactory. In such cases the High Court cannot help feeling, that the decision which it is obliged to leave untouched very probably does affect the right determination of the suit between the parties, and yet it is powerless to do any thing towards bettering it. In all cases of this sort it is clear that the interposition of the Lower Appellate Court between the Court of first instance and the High Court is productive of absolute mischief."

Mr. Justice Phear, speaking of the remedy against these evils, proposes the following scheme :

"Its principal features are abolition of the Appellate jurisdiction of the Zillah and Subordinate Judges, union of the Mooniffs, Subordinate Judges and the Judge into one Court of original jurisdiction having a single organization at the head of which should be the Judge. Appeals to lie as of right to the High Court only

in suits valued at Rs. 1,000 and upwards and upon grounds of objection which must have been made either at the trial or with the leave of the Judge who presided at the trial, within a certain limited time afterwards, and must be stated by that Judge. But in all cases whatever the High Court to have power on good cause shown to revise the proceedings of the Lower Court, and both upon appeal and upon such revision, to direct a new trial, or if it thinks the trial has been good, to pass such decree as, on the facts found and stated by the Court below, the law warrants."

Such are the opinions of some of the Judges of the High Court,—certainly the best authorities on the subject. Thus it is evident that the present system of procedure is but ill-calculated to subserve the proper ends of a sound administration of justice.

Now, the efficiency of a judicial system depends as well upon a Code of laws, based upon sound juridical principles as upon the character and attainments, legal and general, of the officers who may be entrusted with the duty of administering those laws. This proposition being admitted, the question arises, whether we have here such laws as answer to the above description, and such a body of judicial officers as are duly qualified for the offices which they hold.

The answer is plain enough ; as it requires no very great penetration to determine that our judicial system is rotten to the very core, as well on account of the defects and imperfections which disgrace our Statute Book, as on account of the ignorance and shortcomings of the officers whose duty it is to expound the said Statutes. That the laws which are forged at our Legislative anvil, are in general far from what they ought to be, must be patent to every one who has had any opportunities of observing their operation, with reference to the actual requirements of the country. This result is, we believe, mainly due to the absence of the Native



element properly qualified for the purpose at the Legislative Board. True, there is a provision which renders Native members eligible to our Legislative Councils, but then, the selection being confined to Rajahs and Zemindars, who generally do not combine in themselves a special training in the science of legislation, with a comprehensive knowledge of the actual requirements of the country, we cannot expect that fair proportion of benefit at their hands which they might otherwise be the means of conferring upon their countrymen. A native gentleman being nominated a member of a Legislative Council, considers himself greatly flattered by the appointment; and therefore his first duty in his opinion is to endeavour to express his sense of obligation to the Sahibs, his colleagues, by voting with them. There are certainly exceptions, and honorable exceptions too, but then they are very rare, and in cases where there is a division, their voices are lost in an insignificant minority. If Government is really desirous of securing the services of well-qualified native gentlemen as members of the Legislature, there ought to be a departure from the stereotyped process of making the selections from among the Rajahs and Zemindars. Wealth in India is not a sufficient guarantee of the knowledge or intelligence either of its possessors. In every other country the possession of wealth imposes a degree of responsibility upon its owners which they must discharge, not only by a proper distribution of the means at their disposal in works of charity and public utility, but also by rendering themselves worthy by their intellectual culture of the position in society to which their riches entitle them. Here however the case is just the reverse. No such responsibility attaches to a rich man, whose ignorance is always in direct ratio to his wealth. High caste people only in Government and other service think of educating their sons and relatives as the means of enabling them to earn a decent livelihood, while the rich, secure in the possession of their wealth, consider it

beneath their dignity to subject their sons to the drudgery of acquiring knowledge, upon the very cogent ground of there being no chance of these young gentlemen being ever in need or want. Under these circumstances, Government would do well to make knowledge and intelligence the criterion of eligibility to the Legislative Council rather than wealth which, for the most part, at least in Bengal, is in the hands of tradesmen or their descendants.

If the matter, *i. e.*, (Legislation in India) says an *Edinburgh Reviewer*,\* is left to English lawyers or English legislators, we can see what will happen. They will be ever trying to thrust upon their country their crude English notions just as they are, antiquated, anomalous and obscure."

To guard against this evil we have suggested the necessity of introducing well-educated natives into our Legislative Councils, and if the selections are made from this class, we have not the least doubt, but that a decided improvement will take place in the quality of the laws that may be passed.

Let us next turn to our Judicial Staff. These consist of District Judges who exercise both civil and criminal powers, Subordinate Judges and Moonsiffs who exercise ordinarily civil powers only, and Magistrates, Joint-Magistrates, Assistant-Magistrates and Deputy Magistrates who exercise only criminal functions. Of these seven classes of officers, the Moonsiffs and Subordinate Judges, who have received a legal education, may be said to have been properly trained to their duties. But even these, although as a class they are by far superior to their predecessors, whose knowledge of the law was derived from Bengali or Urdu translations of the Regulations and the Acts, can on no account be considered to be *model* officers of their kind. The remaining five classes are, as a rule, without any legal training whatever,—a circumstance

\* *Edinburgh Review* No. 266, October, 1860, Indian Judges British and Native.

which is fraught with the most disastrous consequences to the public at large.

In a minute published in the selections from the records of the Government of India, Home Department, No. LXX 1868, Mr. G. Loch says :

"An Assistant remains at the Sudder Station of a District for a very short period. In the course of a year from his joining it, he is liable to be sent to take charge of a sub-division. For the next fifteen years of his career, he is employed in the duties of a Magistrate and Collector. Without any training in the particular duties of a Civil Judge, or any knowledge of the law by which his proceedings are to be guided, a man, after fifteen or more years' service as Magistrate or Collector, or both, is transferred to the Bench, and expected to control a number of Subordinate Courts; the Judges of which may have commenced and continued their judicial career before he entered the service."

This is the testimony of the senior civilian Judge of the High Court of Calcutta. Really, it is an anomaly, that people without any legal training or even knowledge, should be pitchforked on the Bench, to dispose of questions not only of a civil nature, but also questions, involving the life and death of Her Majesty's British Indian lieges. It is said that, in time, these officers turn out excellent Judges. We emphatically deny that, as a rule, this assertion holds good. We have had the good fortune or bad fortune (we do not exactly know which,) to come across Moffusil Judges of all grades and denominations, and if our opinion is worth any weight, we must say that we have not been very favorably impressed with their ability or attainments. Being on the Bench for a certain length of time, in this country, is not enough to enable a man to acquire what is commonly called *experience*. In our Courts, the ordinary course of things seems to be reversed. Instead of benefiting by experience, our Judges seem to deteriorate in proportion to the length of their service. Paradoxical as this proportion may appear to one not familiar with our

Courts, it is nevertheless not the less correct on that account. We have seen well-informed and intelligent Moonsiffs, gradually metamorphosed into the very type of a Sub-Judge of the old school, distinguished by an extraordinary amount of dogmatism, which is only equalled, if not surpassed, by his ignorance and want of energy. The fact is, the moment a young man fresh from the college joins his appointment as Moonsiff, he fancies himself to be a great man. He sees around him people who are all his inferiors. The vakeels and the Amla of his Court flatter his vanity, and their fulsome adulation is mistaken for well-deserved compliment. His learning, general and professional, and his intelligence, his tact in detecting a perjured witness, and his intuitive sense of justice form the staple of their conversation among themselves in the presence of the Huzoor. Thus inflated with an idea of his own importance, he bids adieu to his books, and employs his leisure in gossiping and smoking his chillum. By the time it is his turn to be promoted to a Sub-Judgeship, he may be fairly supposed to have lost all his energy, intelligence, and even, to a certain extent, the knowledge of the law he at one time possessed. The only improvement now visible in our Hakim consists in the enlarged dimensions of his paunch. With this particular qualification, he is translated to the Bench of the Sub-Judge. Whether any particular charm attaches to this Bench, we are not sure, but the fact is certain, that here, the deteriorating process soon reaches its climax. Invested with powers almost equal to those of the District Judge, he makes it a point generally to utilize them with a vengeance. He still remembers, how his decrees as a Moonsiff, were mercilessly reversed and modified by the Appellate Courts. It is now his turn to sit in appeal over the decisions of the Moonsiffs of his district. How he chuckles at the thought! Really the idea is delicious!!! He now deals with the decisions of the Lower Courts just as his own decisions as a Moonsiff were dealt with by the

Appellate Courts; and does not think it worth his while even to study properly the new laws that are passed. The reports of the High Court constitute the only literature of the law, which he considers it necessary to dip into at his leisure, and even these, he not unfrequently misquotes and misapplies at random.

The above remarks do not, however, apply with full force to the civilian Judges, though, we cannot say, if *they even*, as a rule, benefit much by what is called experience. A magistrate, promoted to a District Judgeship, does not much improve there in ability and general attainments, nor does the same individual elevated to the Bench of the High Court, evince any particular aptitude for judicial duties that he did not possess before. The fact is, not being originally trained to the profession of the law, the gentlemen of the Civil Service merely pick up a tolerable knowledge of the rules of practice, and being guided only by such light of natural intelligence as each may happen to possess, in the exposition of the substantive law, or the law of justice, equity and good conscience, they are very often betrayed into the most glaring errors and absurdities. The Bar is altogether useless and scarcely deserves the name. But irrespective of the shortcomings of the vakeels in the Mofussil Courts, thus much cannot be denied, that the Hakim has very often every thing in his own way. He does not think it generally worth his while to argue with the pleaders. He carries every thing with a high hand, and in an arbitrary fashion. If the argument at the Bar chimes in with his own idea upon a given subject, well and good, but if otherwise, it is not so easy to convince him of the erroneousness of his view as is generally supposed. Thus it is evident, that his own natural intelligence is his only guide in the determination of the cases which he may have to dispose of. For it is but seldom we find, in an unprofessional Judge, that spirit of patient enquiry which ought, invariably to distinguish his proceedings; and the result is, that whatever may be

the length of his service on the Bench, his decisions are generally all of a piece. Without a previous training at the Bar, it is absurd to expect in a person, promoted *per saltum* to the Bench, that legal acumen, that spirit of patient investigation, and above all, that sense of responsibility, which ought to enter so largely into the composition of the judicial character. The judicial staff ought therefore to be recruited from the Bar only, Native and European, and unless a few years' practice at the Bar is made the *sine qua non* of elevation to the Bench, there is no chance of our improving the quality of, what is now called, the justice which is dispensed to the suitors who hang about our Courts.

The absurdity of the present system of appeals, as provided in the Code of Civil Procedure, has been already pointed out by the Judges of the High Court. You may modify that Code as much as, and in any way, you please; but unless you secure the services of properly-trained lawyers on the Bench, we fear there can be no improvement in our system of judicial administration.

The special appeals have been condemned by the Judges of our highest Court of appeal, not because the decisions of the Lower Appellate Courts are unimpeachable in themselves, but because, under the law which relates to such appeals, the Judges of the High Court cannot afford the parties concerned that full relief which, in all conscience, they have a right to demand. Sir Barnes Peacock very properly remarks, "there is no sound principle upon which an establishment ought to be kept for correcting errors in law when *errors as to the facts remain—unredressed.*"

Mr. Loch, speaking of these appeals, says, that the defect of investigation "lies principally on a finding of fact which the High Court cannot correct in special appeal."

Justice Phear says that "the interposition of the Lower Appellate Court between the Court of first instance and the High Court is productive of absolute mischief!" For however much the High

Court may be convinced of the worthlessness of the decision of the Lower Appellate Court on facts in a suit, "it is powerless," under the present state of the law, "to do anything towards bettering it."

Justice L. S. Jackson would remedy this state of affairs by abolishing the post of Subordinate Judge, and by limiting the jurisdiction of Moonsiffs to suits for money or moveable property up to Rs. 2,500, and allowing appeals to the High Court in four particular instances only, as we have already seen above. His scheme as reproduced in the minute before us, does not give us a clear idea of the changes he would introduce. We are left accordingly to infer a good deal of what he has not said from what he has said. It appears, that he would abolish special appeals, and allow a regular appeal to the High Court where the Lower Appellate Court has reversed the decree of the Court of first instance. He would appoint more than one Judge to the Lower Courts, but he gives us no details. In suits of the value below 10,000 Rupees he would not allow even a Regular Appeal to the High Court, unless the Judges of the Lower Court differed from each other, or unless the appeals were certified to be fit cases for appeal, by "some one of a limited number of pleaders or advocates specially empowered by the Court to give such certificates." This is non-pareil. Justice Jackson, not satisfied with the control which the High Court exercises at present over the Advocates or Pleadings, would divide the Bar into certificated and non-certificated advocates or pleaders at the discretion of the Court. We really fail to perceive the wisdom or expediency either, of this proposition. To our lay understanding it appears, that, if a person is qualified to be an advocate or vakeel of the High Court, he ought to enjoy all the privileges of such advocate or vakeel without any reservation, let or hinderance. If he is not fit to enjoy *all* the privileges which attach to the post of such advocate or vakeel, he is not fit to be an advocate or vakeel to all. If the Court has no

confidence in an advocate or vakeel, he ought to be disbarred at once, on his failing to shew cause to the contrary. But before he is proved to be unworthy of the confidence of the Court, in respect of his character, ability, and attainments, he cannot in justice and fairness be *deprived* of the power, which attaches inherently to his position as such, to certify an appeal to the Court. What strikes us as particularly strange is that this proposition, so absurd on the face of it, should have emanated from such an enlightened gentleman as Justice Jackson, for whose intelligence and general knowledge, we have the greatest respect.

We do not think we are in a position, with reference to the data before us, to comment on the scheme by which Justice Jackson would replace the present judicial system.

Justice Phear would have, we suppose, in each district, a Court consisting of the District Judge, a Subordinate Judge and a Moonsiff to adjudicate on all manner of cases. One such Court, we are afraid, will be all but adequate to the requirements of a whole district, not to mention the trouble and expense, to which most suitors must be subjected in travelling to the Sudder Station, for the purpose of filing a plaint or a written statement, &c., in a suit involving, may be, a value of not more than rupees five or so.

The learned Judge would allow an appeal to the High Court as a matter of right in all cases, in suits, valued at Rs. 1,000 and upwards "upon grounds of objection which must have been made at the trial, or with the leave of the Judge, who presided at the trial, within a certain limited time afterwards, and must be stated by the Judge." This pre-supposes the existence of a well-educated Bar, capable of conducting cases properly before a tribunal presided over by well trained lawyers, who are imbued not only with a proper sense of the responsibility which attaches to the office, but who are perfectly familiar with the manners, customs, habits and the language of the people. That neither the

Judges nor the vakeels in the Moffusil come up, to this standard, Mr. Justice Phear is fully aware. How is it possible then to effect any improvement in the administration of justice, without introducing fresh blood into the system? The arrangement proposed by the learned Justice is certainly the best that can be devised, but there is very little chance of its succeeding, unless we make it a rule that none but trained lawyers should be appointed to the Bench of the new Courts.

Mr. Stephen proposes the following scheme for the administration of justice:—“I would take the division as the unit of judicial administration, though the Local Government should be empowered to vary it. I would leave much as they are the powers of Assistant Magistrates, Joint Magistrates and Magistrates of Districts in criminal matters, nor would I alter the powers of the Civil Courts of first instance, but I would constitute in each division a Civil and Criminal Court of which the Civil and Sessions Judge should be president, and all full power Magistrates and Subordinate Judges in the division should be ex-officio members. The local Government should have power to appoint Small Cause Court Judges to be civil members, if they thought fit.

The Commissioner of the Division should exercise executive authority over these Courts, and, in particular, should convene them from time to time to dispose of business. Each Court should consist of three members,—the Judge and two full power Magistrates for criminal cases, the Judge and two Subordinate Judges, or other civil members for civil cases.

The Commissioner should fix the time and place for the meetings of the Courts, and the persons of whom the court should be composed, having regard to the state of business, and also arranging matters in such a manner, that no one should be a member of a Court which was to try appeals from his own decisions. The jurisdiction of the Courts should be as follows:—

### 1, CIVIL COURT.

*Appellate Jurisdiction.*—From all inferior Courts from which an appeal lies in all cases which such Courts are competent to entertain.

The decision of the Court to be final, but they should have power in their discretion to state cases for the High Court. *Original Jurisdiction.*—All cases, of whatever amount, above the competency of the inferior Courts.

An appeal to lie to the High Court in cases under half a lakh of Rupees; to the Privy Council in cases over half a lakh; or with special leave from the High Court.

### 2, CRIMINAL JURISDICTION.

*Appellate Jurisdiction.*—Appeals from convictions by full power Magistrates; the judgment of the Court to be final.

*Original Jurisdiction.*—The jurisdiction of a Court of Session. The judgment of the Court to be final, but the Court should have power to state a case in their discretion for the High Court.

The High Courts should retain their present powers of revision, perhaps even in an extended shape, but they should be exercised in the discretion of the Court.

I would add a provision somewhat enlarging the Civil Original Jurisdiction of the High Courts, which might be invested with such jurisdiction upon the application of the parties in cases, valued at half a lakh of rupees or upwards or upon special application. An appeal in such cases should lie to the Privy Council. And in all such cases the High Courts should have power in their discretion to state cases for the Privy Council.”

In another part of the minute, Mr. Stephen says:

“And I think that appeals should either go straight to the Privy Council from the courts of first instance, or should be in the shape of cases reserved for the opinion of the Court above, upon facts found by the Court below.”

This scheme is also liable to the same objections that have been advanced in

respect of that proposed by Justice Phear. The Subordinate Judges, whom Mr. Stephen would place on the Bench of the division Court, would, we fear, be mere non-entities concurring, in every instance, with the Burra Hazoor; for it is all but reasonable to expect that subordinates should, as a rule, manifest that independence of opinion which is so absolutely necessary to the dignity of the judicial office.

Mr. Stephen would throw open the appointment of District and Sessions Judge to barristers practising in India and to pleaders of a certain standing.

This is, to be sure, a good proposition, calculated as it is to promote the efficiency of the Bench.

We wonder Mr. Stephen makes no provision for those cases in which there may be a difference of opinion among the Judges. Perhaps he thinks, and we believe, rightly too, that under the constitution proposed, no such contingency can possibly arise. We should certainly like to see a Bench composed of a barrister, a vakeel and a civilian, with the same official designation, and enjoying the same pay and emoluments, but we can on no account reconcile ourselves to the idea of a Bench being constituted with District and Sessions Judges and their Subordinates.

Mr. Stephen, however, adds: "Moreover, some scheme should be devised by which the natives of different parts of the country should get a full share of the appointments given to their countrymen in their own countries. It seems to me that the Natives of the Presidency towns, and in particular the Bengalees, have at present an unfair advantage in this respect."

This certainly is an unmistakeable sign of a heart too full of the milk of human kindness. Mr. Stephen is not however quite sure how his suggestion may be carried out. He says, "*some scheme*" ought to be devised by which the benefits of Government situations may be equalized among the inhabitants of the different provinces and districts of the British Indian Empire. We really do not know how such a "scheme" can be

devised, in the teeth of the fact, that all the parts of the country are not equally advanced in knowledge and civilization. Such being the case, we do not understand how it may be possible to distribute the loaves and fishes of Government in equal proportions among the people. If "the Natives of Presidency towns and in particular the Bengalees" have a monopoly of Government offices, it is simply because they are better qualified to fill them than their less fortunate countrymen. Does Mr. Stephen mean that as a Bengalee occupies a seat on the Bench of the Calcutta High Court, a Santhal ought to occupy a similar place in the Court of Chota Nagpore. Really the idea is unique.

With reference to what is called the Non-Regulation Districts, Mr. Stephen says:—

"People constantly forget that law is a guide for the Judge as well as a rule for the public; and the fact that the public are too ignorant or careless to understand it, is no reason why the Judges should not know it. It is rather an additional reason why they should. The effect of popular ignorance on the subject will be, that the people will be helpless against any error into which the Judge may fall; but this is an additional reason why the Judge's official superiors would keep a firm hand upon him."

Surely this logic is unexceptionable. It is certainly a great mistake to entrust the administration of justice in these provinces into the hands of gentlemen who are generally innocent of even the most rudimentary principles of jurisprudence. Why such gentlemen are considered specially qualified to dispense justice to an illiterate population, it really transcends our powers to understand. Indeed, it is anything but reasonable to suppose, that persons, who have manifested a particular aptitude for parade drill, should, as a rule, likewise, excel on the bench as civil and criminal Judges. This system evidently began in a mistake, but that is no reason why it should be perpetuated by a strict adherence to that mistake. The sooner it is rectified, the better for all

parties concerned. We all know what absurd decisions are every day perpetrated by these "non-regulation" Hakims—decisions which are quietly submitted to by persons who cannot afford to appeal to the High Court.

Mr. Stephen thinks appeal to be more necessary in wild than in civilized districts. He observes:—

"It may appear paradoxical, but after as much thought and enquiry as I have been able to give to the matter, it appears to me to be true, that complete simplicity and directness in the administration of justice are attainable only in comparatively civilized parts of the country, and that, in proportion as the population is wild and the habits of the people simple, greater complication in the machinery for administering justice is required. \* \* \* \* \*

In a highly-civilized state of society, people are aware of their rights, they are advised by lawyers who well know what it is necessary to prove, and their disputes are brought before tribunals fully competent to deal with them. Hence, as a rule, there is no reason why the first trial should not be the last also. In proportion as the people amongst whom justice is to be administered becomes rude and uncivilized, the probability that the case will not be duly heard, and the facts relevant to the decision will not be disclosed on the first occasion, increases. On the other hand, resentment against injustice, real or supposed, is probably keener amongst wild than amongst civilized people, and the notion of acquiescing in a legal decision, merely because it is a legal decision, is altogether foreign to their habits of mind."

These observations are perfectly sound in themselves. But if by "a highly-civilized state of society," Mr. Stephen means the state of society as it prevails in what are called the Regulation Districts, he cannot be said to have studied the country and its people to any advantage. To say that even in Bengal, which is admittedly the most advanced province in the British Indian Empire, the suitors have the benefit of the advice of "lawyers who well know what it is "necessary

to prove" or of the decision of "tribunals fully competent to deal with their disputes" is simply absurd in the teeth of the fact, that the highest tribunals in the country are presided over by unprofessional men who are selected at random from the Covenanted Civil Service, Mr. Justice Phear's testimony of the utter worthlessness of the Mofussil Bar is almost conclusive on the point. In this state of things, there is no part of British India in which, according to Mr. Stephen, "the first trial ought to be the last." And yet Mr. Stephen denounces the natives as a litigious people. If they are not generally satisfied with "the first decision," it is simply because that decision, according to Mr. Stephen's own admission, cannot be presumed to be of a very superior quality. A good decision always puts an end to litigation, but that is a rarity in this country for reasons which it is needless to recapitulate here.

Mr. Stephen concludes:—

The administration of justice in India "in several important respects contrasts most favorably with the administration of justice in England; and that, if its shortcomings are remedied in a gradual manner and on a systematic plan and with a definite object in view, it is almost impossible to over-estimate the moral and general effect which it will ultimately produce upon the people at large, although its advantages must always be greatly diminished by difficulties altogether inseparable from our position in India."

We do not exactly know whether our judicial system "contrasts most favorably with the administration of justice in England." One fact, however, must be admitted, that the administration of justice in this country is "in course of improvement," but this improvement cannot be considered to be complete before the "powers that be" make it a rule to recruit the judicial staff from among practising lawyers only.

We will return to the subject in an early issue, and try to sketch a scheme of judicial administration, such as in our opinion is calculated to remove the shortcomings of the present system.



## OFFENCES AGAINST OTHER LAWS.

1 Section	2 OFFENCE.	3 Whether the Police may arrest with- out warrant or not.	4 Whether a warrant or a summons shall ordinarily beave in the first instance.	5 Whether bail- able or not.	6 Punishment under the Indian Penal Code.	7 By what Court triable.
	If punishable with death, trans- portation, or imprisonment for seven years or upwards.	May arrest with- out warrant.	Warrant	Not bailable...	.....	According to the pro- visions of Sec. eight of this Code.
	If punishable with imprisonment for three years and upwards but less than seven.	Ditto	Ditto	Ditto	.....	Ditto.
	If punishable with imprisonment for less than three years.	Shall not arrest without warrant	Summons	Bailable	.....	Ditto.
	If punishable with fine only.	Ditto	Ditto	Ditto	.....	Ditto.



## SCHEUDLE V.

*Acts of the Governor General of India in Council.*

Acts and sections containing reference.	Section or Chapter of the former Code quoted.	Section or Chapter of this Code to be substituted.
XVIII of 1864, s. 19	61	307
XXI of 1864, s. 2.	62	518
	63	519
	308	521
	309	522
	310	523
	311	525
	312	526
	313	527
	314	528
XXII of 1864, ss. 3 & 5	23	37
XIII of 1865, s. 29	Chap. XIII	Chapter XXXIII
s. 35	Sections 336 to 340 (both inclusive.)	407, 409, 410, 411, and 412
s. 39	380	287
s. 40	Chap. XXVI	Chapter XXXIV
s. 41	383	301
XIX of 1865, s. 9	23	37
IV of 1866, s. 30	Sections 336 to 340 (both inclusive.)	407, 409, 410, 411 and 412
s. 33	380	287
s. 34	Chap. XXVI	Chapter XXXIV
s. 35	385	305
XXIV of 1866, s. 11	Sections 336 to 340 (both inclusive.)	407, 409, 410, 411 and 412
s. 14	380	287
s. 15	Chap. XXVI	Chapter XXXIV
s. 16	385	305
III of 1867, s. 17	61	307
XV of 1867, s. 19	61	307
XXII of 1867, s. 14	61	307
XXIII of 1867, s. 5	Sections 248 to 255 (both inclusive.)	149, Chapter XVII and the provisions applicable to warrant cases.
s. 6	334 and 335	405 and 406
I of 1868, s. 5	61	307
VI of 1868, s. 19	308	521
s. 35	and Chap. XX	521 to 529 (both inclusive).
XIII of 1869, s. 2	61	307
	198	338 and 339
	and 364	334, 335, 337, 338, 339 and 340
XVIII of 1869, s. 18, cl. (b)	Chap. XXII	Chapter XL
XXI of 1869, s. 30	Chap. XIX	Chapter XXXVIII
VIII of 1870, s. 6	61	307
	and 316	536
IX of 1871, sch. II, No. 46	Chap. XXII	Chapter XL

*Acts of the Governor of Madras in Council.*

Acts and sections containing reference.	Section or Chapter of the former Code quoted.	Section or Chapter of this Code to be substituted.
III of 1864, s. 23	Chap. VIII	Chapter XXVII and sections 415 to 420 (both inclusive).
X of 1865, s. 116	Chap. XX	Sections 521 to 529 (both inclusive).
I of 1866, ss. 3 and 5	s. 23	37
I of 1867 s. 1	Chap. I	Chapter I

*Acts of the Governor of Madras in Council.—(Continued.)*

Acts and sections containing reference.	Section or Chapter of the former Code quoted.	Section or Chapter of this Code to be substituted.
VIII of 1867, s. 4	ss. 68 ... ..	142
	97 ... ..	183
	127 ... ..	377
	128 ... ..	378
	129 ... ..	381
	130 ... ..	415
	131 ... ..	416
	132 ... ..	417
	133 ... ..	109 and 110
	137 ... ..	117 (first clause.)
VIII of 1867, s. 4	152 ... ..	124
	153 ... ..	125
	97 ... ..	183
s. 9	Chap. IV ... ..	Sections 139, 140, 144, 141, 147, 142, and Chapter XII.
	Chap. V ... ..	Sections 159, 161, 163, 164, 165, 166, 91, 167, 168, 169, 170, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, and 185.
	Chap. VI ... ..	Sections 92, 94, 95, 96, 97, 98, 99, 100, 93, 101, 108 and 480.
	Chap. VII ... ..	Section 92, Clause sixth, latter part.
	Chap. VIII ... ..	Chapter XXVII and Sections 415 to 420 (both inclusive).
	Chap. IX ... ..	Sections, 109, 110, 111, 114, 116, 117 first part, 89, 112, 102, 103, 379, 380, 118, 119, 120, 121, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133 and 136.
	With the exception of sections	
	125 ... ..	385
	147 ... ..	121
	148 ... ..	} Re-enacted in Act No. 1 of 1872 (Evidence Act.)
	149 ... ..	
	150 ... ..	
	154 ... ..	126
	158 ... ..	130
	160 ... ..	132
	161 ... ..	133
	151 ... ..	123
III of 1871, s. 132	Chap. XX ... ..	Sections 521 to 529 (both inclusive.)

*Acts of the Governor of Bombay in Council.*

Acts and sections containing reference.	Section or Chapter of the former Code quoted.	Section or Chapter of this Code to be substituted.
VI of 1862, s. 18	61 ... ..	307
III of 1867, ss. 4 and 6	23 ... ..	37
II of 1868, s. 15	61 ... ..	307

*Acts of the Lieutenant-Governor of Bengal in Council.*

Acts and sections containing reference.	Section or Chapter of the former Code quoted.	Section or Chapter of this Code to be substituted.
II of 1863, s. 7	61	307
VI of 1863, s. 238	61	307
III of 1864, s. 6	23	37
s. 80	61	307
VII of 1864, s. 28	Chap. VIII	Chapter XXVII and Sections 415 to 420 (both inclusive).
IV of 1865, s. 4	Chap. XV	Chapter XVI and the provisions applicable to summons cases.
II of 1866, s. 48	s. 61	307
V of 1866, s. 51	s. 61	307
II of 1867, s. 14	s. 61	307
III of 1867, s. 17	s. 61	307
V of 1867, s. 4	s. 61	307
IV of 1871, s. 19	Chap. XV	Chapter XVI and the provisions applicable to summons cases.

H. S. CUNNINGHAM,

*Offg. Secy. to the Council of the Governor-General  
for making Laws and Regulations.*

ACT No. X OF 1872.

THE CODE OF CRIMINAL PROCEDURE.

CONTENTS.

Preamble.

PART I.

CHAPTER I.—PRELIMINARY, REPEAL, LOCAL EXTENT  
AND DEFINITIONS.

SECTION.

1. Short title.  
Local extent.  
Commencement.
2. Repeal of enactments.  
Saving of special procedure.  
References to Code of Criminal Procedure.  
References in former Acts.  
Certain specified references.
3. Pending cases.
4. Definitions.

PART II.

CONSTITUTION AND POWERS OF THE  
CRIMINAL COURTS.

CHAPTER II.—OF CRIMINAL COURTS.

5. Grades of Criminal Courts.
6. What Officers to hold inquiries.
7. What Courts to try offences.
8. Offences under local and special laws.
9. Appointment and removal of Judges and Magistrates.
10. Saving of existing incumbents.
11. Inquiry and trial in case of European British subjects.

CHAPTER III.—OF COURTS OF SESSION.

12. Sessions Divisions.
13. Power to alter Divisions.
14. Existing local jurisdictions of Sessions Courts to be Sessions Divisions.
15. One Court for each Division.
16. Appointment and powers of Sessions Judges.
17. Appointment and powers of Additional and Joint Sessions Judges.
18. Appointment and powers of Assistant Sessions Judges.

CHAPTER IV.—OF MAGISTRATES AND THEIR  
POWERS.

19. Magistrates to be of three classes.
20. Sentences which Magistrates may pass.  
Powers of Magistrates, first Class.  
Powers of Magistrates, second Class.  
Powers of Magistrates, third Class.

SECTION.

21. Powers conferred upon Magistrates.
22. Powers common to all Magistrates.
23. Powers which Local Government and Magistrate of the District may confer on Magistrates of the third Class.
24. Powers of Magistrates of the second Class.
25. Powers which may be conferred on Magistrates of the second Class.
26. Powers of Magistrates of the first Class.
27. Powers which may be conferred on Magistrates of the first Class.
28. Powers of Magistrates of Divisions of Districts.
29. Powers which Local Government may confer on Magistrates of Divisions of Districts.
30. Powers of Magistrates of Districts.
31. Saving of other powers.
32. Irregularities which do not vitiate proceedings.
33. When irregular commitments may be validated.
34. Irregularities which render proceedings void.

THE MAGISTRATE OF THE DISTRICT.

35. Magistrate of the District.
36. Powers with which Deputy Commissioners and Chief Executive Officers of District may be invested.

SUBORDINATE MAGISTRATES.

37. Subordinate Magistrates.  
Proviso.
38. Power to determine local jurisdiction of a Magistrate of District.
39. Division of Districts into divisions.  
Existing divisions preserved.
40. Local Government may put Magistrate in charge of division.  
Delegation of power to Magistrate of District.
41. Subordination of officers to Magistrate of division of district.
42. Special Magistrates.
43. Mode of conferring powers.
44. Transfer of criminal cases to Subordinate Magistrate.
45. Procedure of Magistrate in cases beyond his jurisdiction.
46. Procedure when Magistrate cannot pass sentence sufficiently severe.  
Magistrate may in the first instance commit accused for trial before Court of Session.
47. Magistrate may withdraw or refer cases.
48. Local Government may empower Magistrates of Districts to withdraw classes of cases.
49. Local Government may authorize Magistrate of District to distribute business by localities.

## MAGISTRATE'S BENCHES.

## SECTION.

50. Power to invest Magistrates sitting as a bench with certain powers.
51. Powers exercisable by such bench in absence of special directions.
52. Magistrate of the District may frame rules for guidance of benches.
53. Magistrate of District may vary or annul rules made under section 52.

## CONTINUANCE AND ALTERATION OF POWERS.

54. Powers may be varied or cancelled.
55. Powers of officer temporarily succeeding to vacancies in office of Magistrate of District.
56. Continuance of powers of officers transferred.

## CHAPTER V.—OF PUBLIC PROSECUTORS.

57. Appointment of public prosecutor.
58. Appointment may be for particular case or generally.
59. Private persons may not act as prosecutors or employ counsel without permission of the Court.
60. He may plead in all Courts in cases under his charge.
61. Barristers, &c., privately instructed to be under his direction.
62. Effect of withdrawal of charge by public prosecutor.
63. Notice to public prosecutor of appeal in cases prosecuted by him.

## CHAPTER VI.—THE PLACE OF INQUIRY AND TRIAL.

64. Place for inquiry and trial of offence.
65. High Court may transfer case or direct trial in district other than that in which offence was committed.
66. Accused triable in district where act is done, or where consequence ensues.
67. Place for trial where act is offence by reason of relation to other offence.
68. Place for inquiry or trial where scene of offence is uncertain, or not in one district only, or offence is continuing, or consists of several acts.
69. Murder as a thug, dacoity, or dacoity with murder.
70. High Court to decide, in case of doubt, district where inquiry shall take place.
71. Effect, on sentence, of holding investigation, inquiry or trial in wrong district.

## CHAPTER VII.—OF CRIMINAL JURISDICTION OVER EUROPEAN BRITISH SUBJECTS.

72. "European British subjects."
73. Officers who may inquire into and try offences committed by European British subjects.
74. Who may hear complaints and issue process.

## SECTION.

74. Magistrates of the first class being European British subjects, and Justices of the Peace, may inquire into complaints against European British subjects.
75. When such Magistrate may try, and extent of his jurisdiction.
76. When commitment is to be to Court of Session.
77. When commitment is to be to High Court.
78. Jurisdiction of Court of Session.
79. When Sessions Judge finds his powers inadequate.
80. Proceeding when Sessions Judge is not a European British subject.
81. Mode of conducting trials by Court of Session.
82. Appeal from conviction of such subject by Magistrate.
83. Appeal from conviction by Court of Session.
84. Right of European British subject under detention to apply for order to produce his person.
85. Procedure on such application.
86. Power of High Courts as to issue of writs.
87. Procedure on claim of European British subject to be dealt with as such.
88. Failure to plead status a waiver.
89. Trial of person not a European British subject under this chapter.
90. Procedure of High Courts.
91. Proceedings against European British subjects to be regulated by this Act.
92. Place of confinement.

## PART III.

## OF THE POLICE.

## CHAPTER VIII.—OFFENCES OF WHICH INFORMATION MUST BE GIVEN TO THE POLICE, AND DUTY OF THE PUBLIC.

93. All persons to give information of certain offences.
94. Landholders and others bound to report certain matters.
95. All persons to assist Magistrate and Police in certain cases.

## CHAPTER IX.—OF ARREST WITHOUT WARRANT.

96. When Police may arrest without warrant.
97. Person charged refusing to give his name and residence.
98. Arrest of vagabonds.
99. Police to prevent certain offences.
100. Information of design to commit such offences.
101. Arrest to prevent such offences.
102. Injury to public property.
103. Ingress to be allowed into house entered by person of whom Police in search.
104. Procedure where ingress not obtainable.
105. Person arrested to be taken before Magistrate or officer in charge of Police station.

## SECTION.

102. Procedure when Police officer deposes subordinate to arrest without warrant.
103. Police may pursue offenders into other jurisdictions.
104. Detention of Offenders attending Court.

## OF ARREST BY PRIVATE PERSONS.

105. Arrest by private persons.
106. Arrest of deserters from British ships.
107. How to proceed with person arrested.
108. Offence committed in Magistrate's presence.

## CHAPTER X.—POWERS OF THE POLICE TO INVESTIGATE.

109. What offences Police officer may investigate.
110. What offences Police may not investigate.
111. Saving of powers vested in Police by special or local law.
112. Complaint to Police to be in writing.
113. Complaint in non-cognizable cases.
114. Upon information, &c., Police officer in charge of station to proceed in person or depute a subordinate.
115. Preliminary inquiry.
116. Where local investigation dispensed with.
117. Where Police officer in charge sees no sufficient ground for investigation.
118. Police officer's power to summon witnesses.
119. Oral examination of witnesses by Police. Proviso.
120. No inducement to be offered to confess.
121. Police not to record statement or confession. Proviso.
122. Powers of Magistrates to record statements and confessions.
123. Investigation by Police.
124. Accused not to be detained by Police more than twenty-four hours without special authority.
125. Procedure of Police in case of deficient evidence.
126. Daily record of proceedings.
127. Report of Police officer.
128. Admission to bail.
129. Bail not to be excessive. Terms of security.
130. Complainants and witnesses to execute recognizances to appear.
131. Complainants and witnesses not to be subjected to restraint. Recusant complainant or witness may be forwarded in custody.
132. Police to report apprehensions. Discharge of person apprehended.
133. Police to inquire and report on unnatural and sudden deaths.
134. Power to summon persons.
135. Inquiry into cause of such death by nearest Magistrate.
136. Substitute for officer in charge of Police-station during his absence or illness.
137. Powers of superior officers of Police.
138. Assistant District Superintendent of Police may exercise powers of District Superintendent.

## PART IV.

## OF PROCEEDINGS TO COMPEL APPEARANCE.

## CHAPTER XI.—OF COMPLAINTS TO A MAGISTRATE.

## SECTION.

139. Processes.
140. When summons or warrant may be issued.
141. Who may entertain complaints. Effect of reference. Effect of complaint or Police report.
142. Who may act without complaint. Complaint or sanction required in certain cases.
143. Who may commit for trial.
144. Examination of complainant. Effect of irregularity.
145. Procedure by Magistrate not empowered to hear complaint.
146. Postponement of issue of process.
147. Dismissal of complaint. Issue of process.
148. In what cases a summons may issue.
149. In what cases warrant may issue on complaint.
150. Warrant to arrest if summons not obeyed.
151. Magistrate may dispense with personal attendance of accused.

## CHAPTER XII.

## OF THE SUMMONS.

152. Form of summons.
153. Summons by whom served.
154. Summons how served.
155. Service when accused cannot be found.
156. Issue of warrant in addition to summons.
157. Summons or warrant for offence committed beyond local jurisdiction.
158. Provisions in this chapter as to form, service and issue of summons applicable to all summonses.

## CHAPTER XIII.

## OF THE WARRANT.

159. Form of warrant. Effect of warrant of arrest. Magistrate may direct bail to be taken. Bail-bond to be forwarded.
161. Warrants to whom directed.
162. Warrant may be directed to landholders, &c.
163. Warrants directed to any person other than a Police officer.
164. Warrant to several persons.
165. Warrant directed to Police officer.
166. Magistrate issuing warrant may superintend its execution. Arrest in presence of Magistrate.
167. Where warrant may be executed.
168. Magistrate may issue warrant for execution in places outside his jurisdiction.

## SECTION.

169. Procedure on arrest of person against whom warrant was issued.
170. Procedure by Magistrate before whom arrested person is brought.
171. Proclamation for person absconding.
172. Attachment of property of person absconding.
173. Restoration of forfeited property.
174. Magistrate's procedure on arrest under his own warrant for offence committed out of his jurisdiction.
175. Procedure where such warrant issued by Subordinate Magistrate.
176. Notification of substance of warrant.
177. Warrant how executed.
178. Resisting endeavour to arrest.
179. Search of house entered by person against whom warrant issued.
180. Breaking of door or window.
181. Breaking open zenana.
182. No unnecessary restraint.
183. Person arrested to be brought before Magistrate.
184. Inducements to disclosure or confession.
185. Provisions as to warrant and its execution and issue applicable to all warrants of arrest.

## PART V.

## OF INQUIRIES AND TRIALS.

## CHAPTER XIV.—PRELIMINARY.

186. Right of accused to be defended.
- Where accused person does not understand the proceedings.
187. Criminal Courts to be open.
188. Compounding offences.

## CHAPTER XV.

## OF INQUIRY INTO CASES TRIABLE BY THE COURT OF SESSION OR HIGH COURT.

189. Procedure in preliminary inquiries.
190. Examination of complainant and witnesses for prosecution.
191. Examination to be in presence of accused. Accused may cross-examine.
192. Power of Magistrate to summon and examine any person.
193. Examination of accused.
194. Adjournment of inquiry and remand.
195. When accused person to be discharged.
196. When accused is to be committed for trial.
197. When commitment to be to a High Court.
198. Contents of charge. Copy of charge.
199. Copy of charge to be furnished to accused.
200. List of witnesses for defence on trial. Further list.
201. Copies of depositions to be furnished to accused.
202. When commitment made, Magistrate to give notice to Government prosecutor.

## CHAPTER XVI.

## OF THE TRIAL OF SUMMONS CASES BY MAGISTRATES.

## SECTION.

203. Procedure in summons cases. Object and effect of complaint. When notice is defective.
204. Accused person may be admitted to bail or allowed to be at large on his personal recognizance.
205. Non-appearance of complainant.
206. Substance of complaint to be stated. Conviction on admission of truth of complaint.
207. Procedure when no such admission is made.
208. Adjournment.
209. Compensation in cases of frivolous or vexatious complaints. Recovery of such compensation.
210. Withdrawal of complaint.
211. Acquittal. Sentence.
212. Effect of dismissal.

## CHAPTER XVII.—OF THE TRIAL OF WARRANT CASES BY MAGISTRATES.

213. Procedure in warrant cases.
214. Sections 190 to 194 to apply.
215. Discharge of accused.
216. Charge to be drawn when offence is apparently proved.
217. Plea.
218. Defence.
219. Evidence for the defence.
220. Acquittal. Conviction.
221. How the Magistrate is to proceed when, after commencement of trial, he finds the case beyond his jurisdiction.

## CHAPTER XVIII.—OF SUMMARY TRIALS.

222. What offences may be tried summarily.
223. Power to invest Magistrates with power to try summarily.
224. Power to invest Bench of Magistrates invested with first class magisterial powers.
225. Power to invest Bench of Magistrates invested with less power.
226. Procedure for summons and warrant cases applicable with certain exceptions.
227. Record in cases where there is no appeal.
228. Record in appealable cases.
229. Language of judgment.
230. Bench of Magistrates may be empowered to employ clerk.

## CHAPTER XIX.—TRIAL BY COURT OF SESSION.

231. Cognizance of offences by Court of Session.
232. Trials to be by jury or with assessors.
233. Local Government may order trials before Court of Session to be by jury.
234. Jury for trial of Europeans or Americans. Election to be tried without jury.

## SECTION.

235. Trial before Court of Session to be conducted by Public Prosecutor, Government Pleader.
236. Number of jury.
237. Commencement of trial.
238. Plea of guilty.
239. Refusal to plead or claim to be tried.
239. Assessors how chosen.
240. Jurors to be chosen by lot.
241. Jury for trial of persons not Europeans or Americans.
242. Jury when European or American charged jointly with one of another race.
243. Names of jurors to be called.
244. Objections to jurors.
244. Grounds of objection.
245. Juror to understand the language in which evidence is given or interpreted.
246. Foreman of jury.
247. Examination of witnesses.
248. Examination of accused before Magistrate to be evidence.
249. Evidence given at the preliminary inquiry admissible.
250. Examination of accused.
251. Defence.
252. Prosecutor's right of reply.
253. View by jury or assessors.
254. Procedure when juror becomes unable to attend.
255. Assessor's opinion and charge to jury.
256. Duty of Judge.
257. Duty of Jury.
258. When jurymen or assessor may be examined.
259. Procedure when assessor is unable to attend.
260. Jury or assessors to attend at adjourned sitting.
261. Cases tried with assessors.
262. Decision vested in Judge.
263. Cases tried by juries.
263. Verdict to be given on each charge.
263. Judge may question Jury.
263. Procedure where jury differ.
264. Adjournment.
264. Postponement of trial.
265. The same jury or assessors may try in succession several offenders.

## PART VI.

## APPEAL, REFERENCE, AND REVISION.

## CHAPTER XX.—APPEALS.

266. Appeals from officers exercising powers less than those of a Magistrate of the first class.
267. Appeals in bad livelihood cases.
268. Appeals from convictions in contempt cases.
269. Appeal from Magistrates.
270. Appeals by persons convicted by officers invested under section 36.
270. Appeals from convictions of Assistant Sessions Judges.
271. Appeals by persons convicted by Session Court.
272. No appeal in case of acquittal, except on behalf of Government.

## SECTION.

273. No appeal in petty cases.
274. Appeals from summary convictions.
274. Saving of sentences on European British subjects.
275. Copy of sentence to accompany petition.
276. Copy of sentence or order to be furnished.
277. Procedure when appellant in jail.
278. Rejection of appeal.
279. Notice of appeal.
280. Appellate Court may alter or reverse finding and sentence, or enhance a sentence.
281. Suspension of sentence pending appeal.
281. Release of appellant on bail.
282. Appellate Court may make or direct further inquiry.
283. Finding or sentence when reversible by reason of error or defect in charge or proceedings.
283. Appellate Court may reduce punishment.
284. Procedure in case of conviction by Court not having jurisdiction.
285. Finality of orders on appeal.
286. Unless otherwise provided, no appeal to lie from judgment order or sentence of Criminal Court.

## CHAPTER XXI.—REFERENCE.

287. Sentence of death.
288. Power of the High Court to confirm sentence or annual conviction.
289. Power to direct further inquiry, &c.
290. Confirmation or new sentence to be signed by two Judges.
291. When High Court consists of one Judge.

## CHAPTER XXII.

## SUPERINTENDENCE AND REVISION.

292. Power of High Court to make rules.
293. Calendars of trials by Subordinate Courts.
294. Power to call for records of Subordinate Courts.
295. Powers of Court of Session and Magistrate to call for record of Subordinate Courts.
296. Report to High Court.
297. Powers of revision.
297. Power to order commitment.
297. Power to alter finding and sentence.
297. Proviso to power of altering finding.
297. Power to annul conviction.
297. Power to annul improper and to pass proper sentence.
297. Suspension of sentence.
297. Powers of revision confined to High Court.
297. Optional with Court to hear parties.
298. Courts may order enquiry.
299. Order or revision to be certified to lower Court or District Magistrate.
300. Provisions of section 283 to apply.



**PART VII.**  
**EXECUTION.**  
**CHAPTER XXIII.**

**SECTION.**

301. Procedure in cases referred to High Court for confirmation.
302. Court of Session to send copy of finding and sentence to District Magistrate.  
Warrant of Execution.  
Procedure after sentence passed by Court inferior to Session Court.
303. Form and direction of warrant of commitment.
304. Warrant with whom to be lodged.
305. Execution of sentence under section 301 or 302.
306. Postponement of capital sentence on pregnant woman.
307. Levy of fine.  
Section to what cases applicable.  
Who may issue warrant.
308. Payment of fine in compensation.
309. Imprisonment in default of payment of fine.  
Proviso as to cases decided by a Magistrate.
310. Whipping, if awarded in addition to imprisonment, when to be inflicted.
311. Mode of inflicting the punishment.
312. Punishment not to be inflicted if offender not in fit state of health.  
Stay of execution.  
Not to be executed by instalments.
313. Procedure if punishment cannot be inflicted under the last section.
314. Sentence in cases of simultaneous conviction of several offences.  
Maximum term of imprisonment.
315. Trial of previously convicted persons.  
Proviso.
316. Currency of sentence on escaped convicts.
317. Sentence on offender already sentenced for another offence.  
Proviso.
318. Confinement of youthful offenders in reformatories.
319. Governor General in Council to appoint places to which persons sentenced to transportation may be sent.  
Local Government to direct removal of such persons to places appointed.
320. Person sentenced to transportation while undergoing transportation under previous sentence need not be removed.
321. Sentence of death.
322. Power to remit punishment.  
Power to commute punishment.

**PART VIII.**  
**EVIDENCE.**

**CHAPTER XXIV.—SPECIAL RULES OF EVIDENCE  
IN CRIMINAL CASES.**

323. Evidence of medical witness.  
Court may summon medical witness.
324. Accused may be convicted on his own plea.

**SECTION.**

325. Report of Chemical Examiner.  
Genuineness of signature may be presumed.
326. Previous conviction or acquittal how proved.
327. Record of evidence in the absence of the accused.
328. Convictions on evidence partly recorded by one Magistrate, and partly by another.
329. Commitments on evidence partly recorded by one officer, and partly by another valid.
330. When a commission may issue.  
Mode of issuing commission.  
Prosecutor and accused may examine witness.  
Procedure when commission is required in Magistrate's cases.

**CHAPTER XXV.—EVIDENCE HOW TAKEN.**

331. Examination of complainants and witnesses.
332. Manner of recording evidence.
333. In summons cases and in trials by Magistrates of the first and second classes of certain offences.
334. In all other cases, before Magistrates and in all proceedings before Courts of Session.  
Evidence in English.  
Memorandum when evidence not taken down in writing.
335. Local Government may direct evidence to be recorded by Sessions Judge or Magistrate himself in his vernacular;  
or in English or in language in ordinary use in district.
336. In cases referred to in section 333, Magistrate may record as provided in section 334 or section 335.
337. Local Government to decide what language is to be held to be in ordinary use.
338. Form of record of evidence.
339. Procedure in regard to evidence when completed.
340. Interpretation of evidence to accused or his agent.
341. Remarks respecting demeanour of witness.

**OF THE EXAMINATION OF ACCUSED PERSONS.**

342. Accused may be questioned.
343. Accused not punishable for refusal to answer.
344. No influence to be used to induce disclosures.
345. Accused not to be sworn.
346. Examination of accused how recorded.
347. Magistrate may tender pardon to accomplice.
348. High Court or Court of Session may direct tender of pardon.
349. When Magistrate, Court of Session or High Court may direct commitment of person to whom pardon has been tendered.

**CHAPTER XXVI.—OF SECURING THE ATTENDANCE OF  
WITNESSES.**

350. Procedure for obtaining attendance of witnesses.
351. Power to summon material witness or examine person present.

## SECTION.

352. When warrant of arrest may issue in first instance.  
 353. Procedure when warrant cannot be served.  
 354. Release of attached property of witness appearing and satisfying Court or Magistrate.  
     Sale of property of witness not appearing or not satisfying Court or Magistrate.  
 355. Arrest of person disobeying summons.  
 356. Committal of person refusing to answer.

## INQUIRIES.

357. In inquiries preliminary to commitment. Power to summon supplementary witnesses.  
 358. When accused person is to be committed.  
 359. Refusal to summon unnecessary witness, unless deposit made.  
 360. Recognizances of prosecutors and witnesses. Detention in custody in case of refusal to attend or to execute recognizance.

## SUMMONS CASES.

361. In summons cases.

## WARRANT CASES.

362. In cases tried upon warrant.

## SESSIONS TRIALS.

363. Right of accused as to examination and summoning of witness.  
 364. Procedure in case of witness refusing to answer.

## OF SECURING DOCUMENTARY EVIDENCE.

365. Procedure for obtaining production of document required as evidence.  
 366. When warrant for search for documents may issue.  
 367. Power to impound document produced.

## CHAPTER XXVII.—OF SEARCH-WARRANTS.

368. Search-warrant when grantable.  
 369. Procedure as to letter in custody of Postal Department.  
 370. Direction of search-warrant.  
 371. Warrant to Police Officer may be executed by his subordinate.  
     Endorsement.  
 372. Execution of search-warrant out of district in which issued.  
 373. Search-warrants may in emergency be executed without endorsement.  
     Thing found to be taken to Magistrate within whose jurisdiction it is found.  
     Order thereon.  
 374. Procedure in such cases within Presidency town.  
 375. Magistrate may issue search-warrant to be executed in jurisdiction of another Magistrate.  
 376. Magistrate may send search-warrant by post to Magistrate of another District or division of District.  
     Endorsement and execution by such Magistrate.

## SECTION.

- Direction of warrant to be executed in Presidency town.  
 377. Search of house suspected to contain stolen property or forged documents.  
 378. Magistrate may attend personally.  
     Magistrate may direct search in his presence.  
 379. Search by officer in charge of Police-station.  
 380. When officer of Police-station may require another to issue search-warrant.  
 381. Inspection of weights and measures.  
 382. Persons in charge of closed house to allow search.  
 383. Place to be searched may be broken open.  
 384. Breaking of zenana.  
 385. Search to be made in presence of witnesses.  
     Occupant of place searched may attend.  
 386. Mode of searching women.  
 387. Search of arrested persons.

## PART IX.

## PROCEDURE INCIDENTAL TO INQUIRY AND TRIAL.

## CHAPTER XXVIII.—BAIL.

388. When bail shall be taken.  
 389. Bail not to be taken for certain offences.  
     When bail may be taken.  
 390. Power to direct admission to bail.  
 391. Recognizance of accused and sureties.  
 392. Insufficient bail.  
 393. Bail may be taken at any time before conviction.  
 394. Discharge on bail.  
 395. Discharge of sureties.  
 396. Procedure to compel payment of penalty by accused.  
 397. Procedure to compel payment of penalty by sureties.  
 398. In what cases the powers given by sections 396 and 397 may be exercised.  
     Remission of part of penalty.  
     Revision of orders.  
     High Court or Court of Session may direct Magistrate to levy sum forfeited.  
 399. Deposit may be made instead of bail.

## CHAPTER XXIX.—FORMATION OF LISTS OF JURORS AND ASSESSORS AND THEIR ATTENDANCE.

400. List of jurors and assessors.  
 401. Publication of list.  
 402. Revision of list.  
 403. Annual revision of list.  
 404. Jurors and assessors.  
 405. Disqualifications.  
 406. Exemptions.  
     Person exempted is not bound to avail himself of his right of exemption.  
 407. Court to summon jurors.  
 408. Summoning and empannelling jurors under section 234.  
 409. Form and service of summons.  
 410. Power to summon another set of jurors or assessors.

## SECTION.

- 411. Service of summons on officer of Government.
- 412. Court may excuse attendance of juror or assessor.
- 413. List of jurors or assessors attending.
- 414. Penalty for non-attendance of juror or assessor.

## CHAPTER XXX.—MISCELLANEOUS PROVISIONS.

- 415. Procedure by Police upon seizure of stolen property.  
Sale of perishable property.
- 416. Procedure where owner of property seized unknown.
- 417. Procedure if no claimant appears within six months.
- 418. Order for disposal of property regarding which offence committed.
- 419. Stay of such order.
- 420. Order may take form of reference to Magistrate of District.
- 421. Expenses of complainants and witnesses.
- 422. Interpreter to be bound to interpret truthfully.

## CHAPTER XXXI.—LUNATICS.

- 423. Procedure in case of accused being lunatic.
- 424. When accused appears to have been insane.
- 425. Procedure in case of person committed before a Court of Session being lunatic.
- 426. Release of lunatic pending investigation or trial.  
Custody of lunatic.
- 427. Resumption of inquiry or trial.
- 428. Procedure on accused appearing before Magistrate or Court of Session.
- 429. Finding in case of acquittal on ground of being lunatic.
- 430. Person so acquitted to be kept in safe custody.
- 431. Lunatic prisoners to be visited by Inspector General.
- 432. Procedure where lunatic prisoner is reported capable of making his defence.
- 433. Procedure where lunatic confined under section 430 is declared capable of being discharged.
- 434. Delivery of lunatic to care of relative.

## CHAPTER XXXII.—CONTEMPTS OF COURT.

- 435. Procedure in certain cases of contempt.
- 436. Procedure where Court considers that accused should be imprisoned, or fined more than 200 rupees.
- 437. Discharge of offender on submission or apology.
- 438. Procedure when offender is a European British subject.

## PART X.

## CHARGE, JUDGMENT, AND SENTENCE.

## CHAPTER XXXIII.—OF THE CHARGE.

## FORM OF CHARGES.

## SECTION.

- 439. Charge to state offence.  
Specific name of offence, sufficient statement.  
How stated where offence has no specific name.  
What implied in charges.  
Language of charge.  
Previous conviction to be set out in charge.
- 440. Particulars as to time, place and person.
- 441. When manner of committing offence must be stated.
- 442. Forms in schedule.
- 443. Effect of errors.
- 444. Prisoner may apply for amendment.
- 445. Court may amend a charge.
- 446. How Court of Session may deal with charge.
- 447. When trial may proceed immediately after amendment.
- 448. When new trial may be directed or trial suspended.
- 449. Prosecutor and accused person may recall witnesses.
- 450. Previous sanction to be obtained if offence in new charge required it.
- 451. Effect of material error.

## JOINDER OF CHARGES.

- 452. Separate charges for distinct offences.
- 453. More offences than one of same kind may be charged within a year of each other.
- 454. I.—Trial of more than one offence.  
II.—One offence falling within two definitions.  
III.—Acts severally constituting more than one offence, but collectively coming within one definition.
- 455. Where it is doubtful what offence has been committed.
- 456. When a person charged with one offence he can be convicted of another.
- 457. When offence proved included in offence charged.
- 458. What persons may be charged jointly.
- 459. Withdrawal of remaining charges on conviction on one of several charges.

## PREVIOUS ACQUITTALS OR CONVICTIONS.

- 460. Person once convicted or acquitted not to be tried for same offence.

## CHAPTER XXXIV.—OF THE JUDGMENT, ORDER, AND SENTENCE.

- 461. Judgment to specify offence.  
Judgment in the alternative.
- 462. When judgment is to be pronounced.
- 463. Judgment to be written in English or language of District.  
Proviso.
- 464. Judgment what to contain.  
Judgment to be translated.

*Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeals of Sadut Ali Khan v. Khajeh Abdool Gunnee and Khajeh Abdool Gunnee v. Mussunat Zamoorudoonessa Khanum from the High Court of Judicature at Fort William in Bengal; delivered 22nd January 1873.*

*Present:*

SIR JAMES W. COLVILLE.

SIR BARNES PEACOCK.

SIR MONTAGUE E. SMITH.

SIR ROBERT P. COLLIER.

SIR LAWRENCE PEELE.

Held that the payment of mesne profits taken to include rent within 12 years is evidence of a recognition of the zemindar's title to the rent, which is sufficient to exclude the notion of an adverse possession for more than 12 years before the institution of a suit.

Held that where the High Court has exercised its discretion in a matter wherein the law gives it a discretion, their Lordships in Privy Council would not upon light ground interfere with the exercise of that discretion.

Held that in suits under Section 15, Act VIII of 1859, the Courts must see that the declaration of right may be the foundation of relief to be got somewhere and that this condition is sufficiently answered if a Plaintiff has no other consequential relief in his mind than the right to try his claim to enhance the rent of a tenure in a forum, which alone can entertain such enhancement suits.

In delivering judgment upon these appeals their Lordships think it necessary, in the first place, briefly to review the history of this litigation.

Fyz Ali Khan, a Mahomedan zemindar in the district of Mymensing, died on the 16th of December 1824, leaving two widows and a son. The son is the Appellant in the first, and the husband of the Respondent in the second appeal.

The widows were Shums-oon-nessa and Reazoon, who was the mother of the Appellant Sadut Ali Khan. Fyz Ali Khan, upon the occasion of his marriage with Shums-oon-nessa Begum, had contracted to give her a certain dower, of which one third was to be prompt; and it appears to have been agreed on the same occasion, that he should, in satisfaction of that portion of the dower which was prompt, make over to her, as he accordingly did make over by a kabinnamah, 22 villages forming part of his zemindary. A partition was then in the course of being made between him and his co-sharers in the larger zemindary of which that property which, for the purposes of this suit, may

be called his zemindary, was part; on that partition three of the villages comprised in the kabinnamah fell to the lot of one of his co-sharers; and it is contended on the part of Sadut Ali, that thereupon an ikrarnamah was, a year after the marriage, executed by Fyz Ali, by which he substituted three other villages forming part of his zemindary in the place of those three villages, and created a sub-tenure or dependant talook out of the 22 villages as then constituted under the name of Russoolpoor, on which he received a gross rent of Rs. 49.

In the second suit a considerable contest has been raised as to the genuineness of the ikrarnamah, but it is perfectly certain that by some means or another the substitution of the three new villages for the three former villages did take place; and that whereas the kabinnamah was silent as to the reservation of any rent, the 22 villages were afterwards held upon the terms of paying a rent of Rs. 49.

It will be more convenient, since it is necessary to keep the two appeals in some measure distinct, to consider the objections made to the genuineness of the ikrarnamah when their Lordships come to consider that suit, and to assume that, either by the ikrarnamah or some other means, the 22 villages really did become a sub-tenure paying one rent of Rs. 49.

Immediately upon the death of Fyz Ali there began a litigation concerning his estate, which has continued nearly up to this time, and constitutes an amount of litigation concerning one estate which one would fain hope is singular even in India. Their Lordships do not think it necessary to go through the history of that litigation further than may be required in order to shew the precise relation in which the parties to these appeals stand to each other.

The first suit was brought by Reazoon Begum, on her own behalf and as guardian of her infant son Sadut Ali, against Shums-oon-nessa Begum, who had got into possession of the whole estate; and had called in question the marriage of Reazoon with Fyz Ali and the legitimacy of Sadut Ali in order to establish the right of herself and her son to share in the estate.

That suit went through all the Indian Courts, and was ultimately brought before this Committee. In 1844 Her Majesty made a final order affirming the decisions

of the Indian Courts, which were in favour of the rights claimed by the plaintiffs.

Pending that litigation, Khajeh Ali Molah, the father of the party who is the Respondent in the first appeal and the Appellant in the second appeal, had made advances to Reazoon for the purpose of enabling her to carry on her suit; and, as is usual in India, those advances ended in an arrangement by which she agreed to give him one moiety of what should be recovered in that suit. That agreement was afterwards confirmed by Sadut Ali Khan upon obtaining his majority; and there is no question now upon the present appeals that it was a good and binding agreement, and that it was the foundation of the title of the present Khajeh, who has succeeded to the rights of his father.

It is not immaterial, with reference to some of the arguments which have been addressed to their Lordships at the bar, to observe that although the agreement was originally for one moiety, which would be  $7\frac{1}{2}$  annas of the 15 annas which were finally decreed to the mother and her son, the Khajeh, upon a representation founded on the existence of the sub-tenure and the poverty of Reazoon and her son, agreed to waive his rights as to half an anna, and that the ultimate arrangement was that he should take only 7 of the 15 annas. It is therefore clear that the ultimate contract between the parties was made with a full knowledge of the existence of the subtenure. And if matters had remained as they then were, the rights of the parties would have stood thus: Reazoon Begum would have been entitled to one anna of the zemindary right; Shums-oon-nessa Begum would have been entitled to another anna of the zemindary right and also to the talookdary interest in the villages; Sadut Ali Khan would have been entitled to seven annas of the zemindary right; and Khajeh Abdool would have been entitled to seven annas of the zemindary right.

It had been expressly provided by the original decree of the Sudder Court, which was affirmed by Her Majesty in Council, that the villages which formed the subtenure were to be taken as separated from the corpus of the estate, subject of course to any rent which might be payable in respect of them to the zemindars; and the division of the assets of the zemindary between Reazoon and her son on the one

side and Shums-oon-nessa on the other was accordingly made on that footing.

The position of the parties, however, was afterwards changed. Shums-oon-nessa Begum had died pending her appeal to Her Majesty in Council. It was prosecuted by her heir and brother Hedayetoolah; and he having failed to pay, pursuant to the Order in Council, the costs of the appeal, her interest in Fyz Ali's estate which had descended to him, and of which he was then in possession, was attached and put up to sale. It was bought by Sadut Ali, who afterwards transferred the sub-tenure, and possibly the whole of what he bought, to his wife, who is the respondent in the second appeal.

There is some evidence that in the first instance the Khajeh was put into some kind of constructive possession of the seven annas of the zemindary which had been assigned to him; disputes afterwards took place between the parties, and he found it necessary to bring a suit in order to enforce his rights under the purchase. In that suit a final decree was made in his favour in 1853. Thereupon the rights and position of the parties seem to have been as follows: The wife of Sadut Ali Khan, Zamoorudoonnessa, as the holder of the sub-tenure was entitled to the beneficial interest therein; but whatever rent was payable by her to the zemindary was divisible between those entitled to the zemindary according to their respective shares; the Appellant, being entitled to seven annas of that rent, whatever it might be. As soon as the decree had been made in his favour, he seems to have conceived the notion that he was entitled as zemindar to enhance that rent; and he took proceedings on two occasions, before he brought the suit which has given rise to the first appeal, in order to establish his right to enhance. He was unsuccessful upon both occasions; and upon the last doubt was thrown upon his title to claim a zemindary right in respect of the villages included in the sub-tenure. Thereupon he instituted the suit out of which the first appeal has arisen. The defendants in that suit, Sadut Ali Khan and his wife, although, as will presently be shewn, they had on a former occasion admitted the plaintiff's right to share in the rent reserved on the 22 villages, saw fit to contest that right, and alleged that no zemindary right in respect of the village had passed under the purchase to Khajeh Allim Oolah.

They also contended that if any had passed the plaintiff had never received any rents, and that by reason of his non-reception of any share of the rent for a period of more than 12 years his suit was barred by limitation. Formal issues were settled to raise these defences, and the cause was tried upon them. These were the real points upon which the case was fought in the Courts below; and it has now been admitted at the Bar by Mr. Leith that he cannot support the first of them. It is then conceded that, by reason of the transfer to the Khajeh of the seven annas share in the zemindary, he became entitled to a proportionate share of the Rs. 49 reserved upon the 22 villages.

It was however contended and fully argued by Mr. Doyne that the suit was barred by the Statute of Limitations. Their Lordships have fully considered the able argument that was addressed to them upon that point, and they are not satisfied that the Statute of Limitations was a bar to the suit. The circumstance which was chiefly relied upon by the High Court and made the principal ground of their judgment, was that in the course of the suit which the Khajeh brought to enforce his rights under the agreement for purchase, a large sum for mesne profits became due from Sadat Ali Khan to him; that ultimately there was a compromise between them which fixed the amount to be paid at, I think Rs. 70,000, which sum was actually paid to him within the 12 years. It was argued, however, by Mr. Doyne that the last item of the rent of the villages which could have entered into the sum for which that compromise was made must have been rent which had accrued more than 12 years before the commencement of the suit. Their Lordships are nevertheless not disposed to dispute the view of the High Court that the payment of the sum taken to include the 7 annas of that rent within the 12 years was evidence of a recognition of the title of the Khajeh to the rent, which is sufficient to exclude the notion of an adverse possession for more than 12 years before the institution of this suit.

The case, however, of the respondent does not appear to their Lordships to depend solely upon that admission. There has been throughout this long litigation a good deal of what one may call blowing hot and cold; and it certainly appears that in the first of the proceedings which were taken anterior to the suit for the purpose of en-

hancing the rent, the contention of the defendants was this:—"True, you are entitled as zemindar to a proportionate share of the existing rent of this talook, but you are not entitled to enhance that rent." Therefore it appears to their Lordships that this is not a case to which the Statute of Limitations could fairly or properly be applied.

That disposes of the points which were really the grounds of defence taken in the Courts in India. It was, however, strenuously argued that the suit ought to fail, because it is a suit for a mere declaratory decree seeking no consequential relief. And the objection, as their Lordships gather, which was so taken at the Bar was twofold: first, that no such suit would lie unless some consequential relief could be granted as ancillary to it; and secondly, that to entertain such a suit is a matter of discretion in the Court, and that the Court had in this instance exercised its discretion unsoundly.

Now, with respect to the last of these objections, it might be sufficient to say that if the High Court has exercised its discretion in a matter wherein the law gives it a discretion, their Lordships would not upon light ground interfere with the exercise of that discretion. Nor assuming that there was a discretion to entertain the suit, do their Lordships think that in this case it was unsoundly exercised. The respondent in his last suit for enhancement had been turned round on the ground that he had not any zemindary right in these villages, and he naturally came into the Civil Court in order to have that right ascertained and declared. And if his suit had been dismissed after the parties had joined in the issues in which they did join, the decree would have been a bar to his right to recover even his proportionate share of the rent of the Rs. 49.

Their Lordships have now to consider the first objection.

It must be assumed that there must be cases in which a merely declaratory decree may be made without granting any consequential relief, or in which the party does not actually seek for consequential relief in the particular suit; otherwise the 15th section of the Code of Civil Procedure would have no operation at all. What their Lordships understand to have been decided in India on this article of the Code, and in the Court of Chancery upon the analogous

provision of the English statute is that the Court must see that the declaration of right may be the foundation of relief to be got somewhere. And their Lordships are of opinion that that condition is sufficiently answered in the present case, even if it be assumed that no other consequential relief was in the mind of the party, or was sought by him, than the right to try his claim to enhance in the other forum in which he is now compelled by statute to bring an enhancement suit. It was a necessary preliminary to such a suit that he should establish his right to a share in the zemindary title.

Therefore upon both grounds it appeared to their Lordships yesterday on the close of the Appellant's case that he had failed to show any reason for disturbing the decision of the High Court in the first suit, and that the decree which was the subject of this appeal ought to be affirmed.

Now it is not unimportant with reference to the second appeal to see what that decree was. It is in these words:—"It is ordered and decreed by the said Court that this appeal be decreed, and the decree of the Lower Court be reversed. And it is declared that the 22 villages in the suit comprise a tenure situated within and being part of and paying a rent of Rs. 49 to the proprietors of the zemindary No. 10 on the Towjee of the Collector of Mymensingh, comprising five annas, one gundah, one cowrie, and one krant of Pergunnah Ateeah. And it is further declared that plaintiff is a proprietor of seven annas out of 15 annas of that zemindary, and that as proprietor is entitled to a share of the rent of this tenure in proportion to his interest in the estate." It seems to their Lordships impossible for the Appellant who was the plaintiff in the second suit to go behind that decree, and to say that the 22 villages did not constitute a tenure within the zemindary, on which a gross rent of Rs. 49 was reserved to the zemindars.

Having got this decree the Khajeh proceeded to bring his suit for enhancement against Zummoorudonessa Begum as the holder of the tenure. Among the issues settled in that suit there were these: 1st, Whether the notice had specified the particulars required by law to be specified, and whether it had been duly served. And the second, which was the material one, is in these words: "Are the villages in question liable to en-

hancement of rent as stated by the Plaintiff, or fit to be exempted from increased assessment, being held by Defendant at a fixed rate in perpetuity under a lekhuu granted by the former zemindar." The notice, it was admitted, was a notice which was necessarily given under the 13th section of Act X. of 1859. In the view their Lordships have taken of the second issue it is not necessary for them to consider whether that notice was sufficient. The Deputy Collector who tried the case in the first instance considered that it was sufficient. Some doubt was thrown upon that by Mr. Justice Phear in the High Court. He seems to have considered it insufficient; but their Lordships think it will be far more satisfactory to decide this case upon its merits, and the question raised by the second issue, viz., whether the rent is enhanceable or not, in a suit regularly framed.

The foundation of the tenant's title was the kabinnamah; and the transaction upon the face of the kabinnamah was a transfer of the 22 villages included in it to Shuns-oonnessa in satisfaction of the one-third of her agreed dower. It did not reserve any rent whatever. It did not make any mention of or provision for the payment of the Government revenue payable in respect of those particular villages; and though it did not contain any words of inheritance in the strict sense of the term, it did not contain any express direction that the enjoyment of the villages granted should be limited to any particular time. The nature of the transaction affords strong ground for the conclusion that the villages were intended to be made over absolutely, and for all time; because the woman was entitled to the third of her dower absolutely. She might have disposed of that as she pleased; and when, in lieu of that she took a grant of the villages the presumption is that she was intended to take an absolute interest. Again, the hereditary nature of her interest seems to be almost put beyond a doubt by the decree in the first suit, which is the foundation of the Khajeh's title, because when she died her heir, who was appointed to carry on the suit in her place, did so, and the decree contains a direction concerning these villages, notwithstanding her demise, which implies the existence of the tenure. Nor does the hereditary character of the tenure seem to have been disputed up to the present time.

It may seem strange that no provision was made expressly in the instrument for the payment of the Government revenue. But the zemindar may have been willing to take the whole of the Government revenue upon himself; and his doing this may have been an element in the settlement of the terms upon which the third of the dower was to be given up. Of course such a transaction might be impeached by a purchaser of the zemindary for arrears of Government revenue. But it is nevertheless good against all who claim title under Fyz Ali Khan.

Nor can the fact that the instrument is silent concerning the payment of the Government revenue affect the questions raised by this Appeal; because even if the grant be taken to be a grant of the villages subject to the payment of the Government revenue, and the zemindar may have paid the Government revenue on account of the tenant, his right to recover what he has so paid could not enter into a suit for enhancement of rent, but would be a matter for which he must seek his remedy in a Civil Court.

The question of the ikarnamah is now to be considered. Their Lordships find that the validity of this instrument has been affirmed by the concurrent judgment of both the Indian Courts. They do not deny that there may be circumstances which throw some suspicion upon it, or that it is a document which has not satisfied all the officers before whom it appears to have been produced; but upon the whole they can see no sufficient grounds for disturbing the finding of the Courts below. The plaintiff cannot be heard to say that there was not a substitution of three villages for three of those included in the kabinamah; or that the 22 villages were not afterwards held as a sub-tenure on which a rent was reserved. He comes into the Court, having got a declaration in the other suit that such was the fact, and alleging that by reason of it the relation of landlord and tenant subsisted between him and the defendant, and he fails to show by what means other than the ikarnamah the substitution of the villages and the creation of the tenure took place.

Therefore it seems, to their Lordships that they must accept the ikarnamah as established, and act upon it accordingly. If they do that, it appears to them that inasmuch as the ikarnamah declares the rent to be permanent, the case for enhance-

ment altogether fails, and that the decree of the Indian Courts in the second suit ought also to be affirmed.

The result will be that their Lordships will humbly advise Her Majesty to affirm both the decrees under appeal, and to dismiss each appeal with costs.

*Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Nuffer Chunder Paul Chowdry and another v. Jonathan Poulson, from the High Court of Judicature at Fort William in Bengal; delivered 24th January 1873.*

*Present :*

SIR JAMES W. COLVILLE.  
SIR BARNES PEACOCK.  
SIR MONTAGUE E. SMITH.  
SIR ROBERT P. COLLIER.

SIR LAWRENCE PEEL.

Held in accordance with a Ruling of the High Court, Marshall's Reports, p. 523.

1st.—That in a suit to recover arrears of rent at enhanced rates, when the question of the liability of the tenure to enhancement has been put in issue and fully tried, a decree may be given declaring the tenure liable to enhancement though notice to enhance is not proved.

2nd.—That such decree amounts to proof sufficient to rebut the presumption referred to in Section 16, Act X of 1859, arising from twenty years' uniform payment of rent, that that uniform payment had extended to the time of the decennial settlement.

Held also in accordance with a decision of the High Court, dated 15th February 1865, in the case of Rakhal Doss Bose *versus* Shaik Golum Surwar.

That the bringing of a suit by a landlord to recover arrears of rent at enhanced rates under Act X of 1859, cannot annul the former decree of a competent Court declaring the ryots holding to be liable to enhancement, by entitling the ryot (on proof of payment of uniform rent for twenty years) to claim the benefit of Section 4.

This was a suit for enhancement of rent, to which the defence in substance was that the land with reference to which the question arose had been held at a uniform rent from the decennial settlement, and the defendant sought to avail himself of sections 15 and 16 of Act X of 1859. The Deputy Collector gave his decision for the plaintiff, and determined upon a certain enhanced rent in pursuance of inquiries which he had made. This decision was reversed by the High Court, who held that the plaintiff was not entitled to enhance.

The question has been reduced to one of comparatively small dimensions. The defendant, as has been stated, relies upon sections 15 and 16 of the Act X, of 1859.

Those sections are in these terms:—



Section 15 says: "No dependant talook-dar, or other person possessing a permanent transferable interest in land, intermediate between the proprietor of an estate and the ryots," which is this case, "who in the provinces of Bengal, Behar, Orissa, and Benares holds his taluk or tenure (otherwise than under a terminable lease) at a fixed rent, which has not been changed from the time of the permanent settlement, shall be liable to any enhancement of such rent, anything in section II., regulation VIII., 1793, or in any other law to the contrary notwithstanding." Then section 16 goes on to say: "Whenever in any suit under this Act it shall be proved that the rent at which a taluk or other tenure is held in the said provinces has not been changed for a period of 20 years before the commencement of the suit, it shall be presumed that such taluk or tenure has been held at that rent from the time of the permanent settlement, unless the contrary be shown, or it be proved that such rent was fixed at some later period."

In their Lordships' opinion, the defendant did establish that the rent at which the taluk was held had not been changed for a period of 20 years before the commencement of this suit, and that he thereby cast upon the plaintiff the burden of showing "the contrary" (in the words of the Act), or that the rent had been fixed at some later period, and their Lordships are of opinion that the plaintiff has succeeded in proving that which was cast upon him to prove. His proof consisted mainly in this: that in 1860 a suit was brought, which was decided in 1863 by the High Court, by the plaintiff or his predecessor in title against the defendant's father, under whom the defendant claims, for enhancement of rent. The case of the defendant was then this: in the first place he said that no sufficient notice had been proved; secondly, he said that the taluk had been granted to him, or his predecessor in title, in the year 1824, by various pottahs, and that they fixed a uniform mokurruree rent which could not subsequently be changed. But he did not set up any title previous to those pottahs. He did not set up that which was open to him to set up, namely, that he had held at a fixed rent from the permanent settlement, or, indeed, 12 years before it, which at that time would have been an answer to the case. It should be stated that this suit was decided before

Act X., to which previous reference has been made, came into operation. The state of the Law then was that he could defend himself by showing an ancient tenure, going back 12 years before the decennial settlement; but he made no case of the kind. He made a case of mokurruree tenure, established by pottahs in 1824. Upon that case the Court below gave a decree to the plaintiff on both points, on the ground that the notice was sufficient, the pottahs not being established, and that the power to enhance had been proved. The High Court upon appeal disagreed with the Lower Court upon the first point. They held that the notice was not sufficient, but they proceeded to decide that the plaintiff had a right to enhance.

It has been said that this declaration on their part, that the plaintiff had a right to enhance, although he had given no sufficient notice, was *ultra vires*; that upon failure of proof of notice, the Court had no right to make any such declaration, and, consequently, that such declaration is of no effect; but their Lordships upon this point entirely adopt a decision which is reported in Marshall's Reports of Cases in appeal to the High Court in Bengal, Vol. 1, p. 523, heard in full before Sir Barnes Peacock, Mr. Justice Steer, Mr. Justice Norman, Mr. Justice Kemp, and Mr. Justice Seton Karr, which is precisely in point upon this question. It is there stated that "In a suit to recover arrears of rent at enhanced rates, when the question of the liability of the tenure to enhancement has been put in issue and fully tried, a decree may be given declaring the tenure liable to enhancement, though notice to enhance is not proved." In this case the question of the right to enhancement was tried, as well as the question of notice, and the Court gave a declaratory decree as to the right to enhance.

That being so, their Lordships are of opinion that this decree of the Court in 1863 does amount to proof sufficient to rebut the presumption referred to in section 16 of Act X of 1859, arising from 20 years' uniform payment of rent, that that uniform payment had extended to the time of the decennial settlement. It also amounts to proof that the rent was fixed at some later period.

On this ground, therefore, their Lordships are of opinion that the plaintiff has satisfied the burden of proof which was thrown upon

him. This decision of their Lordships is very much in accordance with a case in the High Court, on the 15th February 1865, of *Rakhal Doss Bose v. Sheikh Golam Surwur*, which is thus described in the marginal note: "The bringing of a suit by a landlord to recover arrears of rent at enhanced rates, under Act X of 1859, cannot annul the former decree of a competent Court, declaring the ryots holding to be liable to enhancement, by entitling the ryot (on proof of payment of uniform rent for 20 years) to claim the benefit of the presumption under section 4." It is to be observed that section 16 is almost in the same words as section 4, the one referring to ryots and the other to under-tenants or talookdars.

With respect to the question of the pottahs, which were put in evidence by the defendant in the former suit which has been referred to, but which were not believed to be genuine at that time, either by the Court of first instance or the Court of Appeal, it appears that these pottahs were rejected also in the present suit, both by the Court of first instance and the Court of Appeal. Their Lordships are not prepared to say that that rejection was wrong; but even if they had been received in evidence, their Lordships are of opinion, upon referring to them, that they would not have established the contention of the defendant in this suit, that he had held by a uniform tenure, commencing, at all events, as early as the decennial settlement. The effect of those grants does not appear to be to show a mere continuance of possession, but according to their Lordships' view they rather point to the creation of a new title.

For these reasons, their Lordships are of opinion that the decision of the High Court should be reversed; that the appeal of the respondent from the Court of the Assistant Collector to the High Court should be dismissed, with costs; and that the last-mentioned judgment of the Assistant Collector should be confirmed. Their Lordships will humbly advise Her Majesty to this effect. The respondents will pay the costs of this appeal.

THE 17TH JANUARY, 1873.

*Present:*

The Hon'ble F. B. KEMP and } *Judges.*  
" " F. A. GLOVER, }

*Special Appeals from a Decision passed by the Judge of Dinagepore, dated the 8th February 1872, affirming a decree of the Moonisiff of Chowkey Putnitollah, dated the 26th September 1871.*

CASE NO. 724 OF 1872.

Ramtouoo Koondoo ... (*Def't.*) *Appellant,*  
*versus*

Sharodaprosad Mullick,  
manager on the part  
of Sreenath Sundyal,  
lunatic ... (*Plff.*) *Respondent.*

CASE NO. 725 OF 1872.

Golam Mahomed Shaha  
and another Intervener  
... (*Appellants,*  
*versus*

Sharodaprosad Mullick,  
manager on the part of  
Sreenath Sundyal, lunatic... (*Plff.*) *Respondent.*

*For Appellants.*—Baboo Mohiney Mohun Roy.  
*For Respondent.*—Baboo Ramechurn Mitter.

When a question is raised as to the amount of the jumma, and such question becomes the subject of a decision, a special appeal will lie under Section 102, Act VIII of 1869, even though the amount of rent claimed is less than Rs 100.

A suit, brought against a ryot under colour of a rent suit, but in reality to have a question of title tried between the plaintiff and another person who has been long in receipt of rent from such ryot, is altogether opposed to the principle laid down Sec. 7, Act VIII of 1859. The decision XVI, W. R., p. 376 followed.

Held, following the decision XVIII, W. R., p. 376, that grounds of appeal not raised in the Court below cannot be entertained on appeal.

*Mr. Justice Kemp.*—Those two appeals will be governed by one judgment. The Appeal in No. 725 is on the part of the Intervener in the Court below, Golam Mahomed Shaha. We propose to deal with his appeal first.

The respondent, the plaintiff in the Court below, brought a suit for arrears of rent against the ryot, who is the appellant in Appeal No. 724 for rent of the years from

1275 and 1277, alleging himself to be the proprietor of a 5as. 6g. 2c. 2k. share of Mouzah Zumun Tetoolah by right, of purchase at a sale in execution of a decree. It was alleged that the entire jumma of the ryot was Rs. 57-15 ans. and that one third of that jumma, namely, Rs. 19-5 ans. 1g. 2c. was annually receivable by the plaintiff on account of his purchased share. The ryot denied the plaintiff's title to receive any rent from him, he alleged that he had never paid any rent to the plaintiff, and that the relationship of landlord and tenant did not exist between them. He then goes on to say that the jumma was not, as stated by the plaintiff. Rs. 57-15as., but only Rs. 39-1½as., that he has paid that jumma all along to Golam Mahomed Shaha and Shurcef Mahomed Shaha, the proprietors of the whole 16as. of jumma Tetoolah who have been made defendants in this suit. The Moonsiff went first into the question of what the jumma was, and, that point was decided in favor of the ryot. On the questions as between the defendant Golam Mahomed Shaha and the plaintiff which was a question of title, the first Court found that, as it had been decided by the High Court on the 6th of March 1868, that Golam Mahomed Shaha's title in the aforesaid Mouzah extended only over a 5ans. 6g. 2c. 2kts. share, and the plaintiff in this suit had obtained a decree in the High Court establishing his share to be 5as. 6g. 2c. 2kts. share, therefore the ryot was bound to pay to Golam Mahomed Shaha rent in proportion only to a 1/3rd share, and that he ought to have deposited the balance of the rent due in the Collectorate. The Moonsiff therefore referred the ryot to a suit as against Golam Mahomed Shaha for a refund of any excess of rent paid by him, and held that the ryot could not be absolved from the payment of rent in proportion to a one-third share to the plaintiff, and that the plaintiff was therefore entitled to a modified decree which was passed accordingly in his favor. In appeal the Judge was of opinion that the decision of the Moonsiff was a just and equitable one, that the very fact of the suit brought by Golam Mahomed Shaha against the present plaintiff shows that the plaintiff was in possession of his purchase, and that as he has, by the decree of the High Court, succeeded to the rights of the person he purchased from, it followed as a matter of course, that it was absurd to say

that the relationship of landlord and tenant did not exist. The Judge was further of opinion that the proceedings of Golam Mahomed Shaha were throughout litigious and improper and in palpable collusion with the ryot defendant. The appeal was therefore dismissed with costs. On the cross-appeal preferred by the plaintiff, that is to say, against that portion of the decision of the Moonsiff which refused to give him the full amount of the jumma claimed by him, the Judge found, that as the plaintiff had no proof whatever of previous rent having been received by him at any time, and as no weight could be placed on the jumma wasil bakee papers drawn up by the plaintiff, the cross-appeal was also dismissed.

A preliminary objection was taken to the hearing of this appeal on the ground that in-as-much as the rent in suit was under Rs. 100, no appeal would lie, and Section 102 of Act VIII of 1869 has been quoted in support of this argument. We are of opinion that this preliminary objection must be overruled. There can be no doubt that there was a question raised as to the amount of the jumma. The plaintiff attempted to vary the jumma hitherto paid by the ryot, the ryot resisted that attempt and the amount of the jumma was the subject of a decision which was given in favor of the ryot. An appeal will therefore lie under the provisions of Section 102. We now come to the grounds of appeal taken by the defendant Golam Mahomed Shaha.

The first ground taken is that the Court below has wholly misunderstood the nature of the previous civil suit, which did not at all shew that the plaintiff was in possession, but the contrary.

2nd.—That the Courts below have misconstrued the decree of the High Court which did not declare or establish any right of the plaintiff or his vendor.

3rd.—That the Court below has found that the plaintiff "had no proof of previous rent paid;" on the other hand, the proceedings in the previous civil suit and Act X suit in 1866, and the evidence in the case clearly shew that your petitioners were in possession and receipt of rent in respect of the whole of property from 1262. The Court below ought to have dismissed this suit, which is clearly an attempt by a side-wind to revive a title which has become extinguished by effluxion of time long before the institution of the present suit.

4th.—That there being no proof of previous receipt of rent or attornment by the tenant, defendant, the Court below ought to have dismissed the plaintiff's suit for rent, and is wrong in holding that the relation of landlord and tenant existed.

It appears that the estate Jumun Tetoolea was the property of three brothers Judoonath, Sheetanath and Sreenath jointly. The present plaintiff is the manager appointed by the Civil Court, representing the estate of Sreenath who, we are told, is a lunatic. Zumun Tetoolea was originally resumed by Government and settled with Judoonath alone. In execution of a decree against Judoonath, one of the three brothers, his rights and interest in the aforesaid Mouzah, were purchased by the defendant Golam Mahomed Shaha in August 1855 or Srabun 1262. This fact is not disputed, and this purchase therefore dates 16 years before the present suit. The plaintiff purchased in execution of a decree in a suit against Judoonath and Konuckmonee, and his purchase is dated some 11 years subsequent to the purchase of Golam Mahomed Shaha. In execution of that decree an attempt was made to attach the whole Mouzah of Zomun Tetoolea as the property of Judoonath and Konuckmonee alone. Golam Mahomed Shaha intervened under Section 167; his intervention was however rejected on the 4th of December 1865, apparently on the ground that the claim was a stale one. Golam Mahomed Shaha then instituted a regular suit to have his title established alleging that from the date of his purchase he had been in sole possession of the whole Mouzah of Zumun Tetoolea, and in that suit he obtained a declaratory decree to the effect, that he was entitled to a one-third share in the Mouzah, it being held that his possession at the time when he brought the suit had not then ripened into a title by an adverse possession of 12 years. The plaintiff subsequently brought a suit against this very tenant for rent, which was dismissed. In 1871, when the present suit was brought, Golam Mahomed Shaha, the defendant, claims to have been in possession for a period of 15 or 16 years of the whole mouzah Jumun Tetoolea. The plaintiff instead of bringing a suit for possession as against Golam Mahomed Shaha, has brought a suit for rent against the ryot, defendant, who has from 1855 been continuously paying the rent to Golam Mahomed

Shaha; the suit being thus brought clearly with the view of bringing in Golam Mahomed Shaha and to have tried, under color of a rent suit, a question of title between the plaintiff and Golam Mahomed Shaha. In a case referred to by the pleader for the appellant, to be found in Vol. XVI, Weekly Reporter, page 235, it has been held that such a proceeding is altogether opposed to the principle laid down in Section 7, Act VIII of 1859. The Court below appears to have entirely misunderstood the nature of the previous litigation between Golam Mahomed Shaha and the present plaintiff. It has never been decided by any Court that the plaintiff was in possession at any time of any land in this Mouzah Jumun Tetoolea; on the contrary it is clear that in the suit brought by Golam Mahomed Shaha, it was found that he had been in possession from 1855 up to the date of that suit or for nearly 11 years at the time that suit was brought. It has also been found by the Court below that the plaintiff has never at any time received rent from the defendant the ryot. This case therefore appears to us to be clearly a case coming strictly within the purview of the decision in Vol. XVI. The plaintiff instead of bringing his suit for possession as against Golam Mahomed Shaha in which case he would probably have been met by a plea in bar, has attempted to bring a suit for rent in order to raise the question of title as between him and Golam Mahomed. Holding therefore that the Lower Courts have taken a wrong view altogether of the decision of this Court with reference to the previous litigation, we reverse the decision of the Judge and dismiss the suit of the plaintiff with costs. With reference to the appeal of the ryot, defendant, the grounds raised in that appeal not having been raised below, cannot, under the Ruling in Vol. XVIII Weekly Reporter, p. 376, be entertained now, but on the grounds of our decision in the appeal of Golam Shaha which must govern this case also, the suit of the plaintiff as against the ryot must be dismissed.

THE 30TH JANUARY, 1873.

*Present :*

The Hon'ble SIR RICHARD

COUCH, Knight ... *Chief Justice.*

The Hon'ble F. A. GLOVER ... *Judge.*

CASE No. 671 OF 1872.

*Special Appeal from a Decision passed by the Judicial Commissioner of Chota Nagpore, dated the 18th of January 1872, modifying the decree of the Deputy Commissioner of Manbhoom, dated the 2nd August, 1871.*

Mahadeb Poddar, plaintiff, ... *Appellant,*  
*versus*

Hurry Mohton, one of the defts.,... *Respondent.*

*For Appellant.*—Baboo Sreenauth Dass.

*For Respondent.*—(Absent.)

When a right of occupancy under Section 6 Act X of 1859, is not set up by a ryot, defendant, the mere finding as to his having a jote with occupancy rights, or his being a tenant with occupancy rights, does not bring him within the category of a ryot within the meaning of Act X, having a right of occupancy which can not be disturbed.

*The Chief Justice.*—The issues raised in the first Court on the merits were; Is the plaintiff entitled to recover possession of it (the land claimed,) as his inoccupree tenure? and secondly can the plaintiff obtain the wasilat claimed?

The first issue is undoubtedly large enough to have allowed the question to be raised on behalf of the first defendant, that even if he had failed to prove the title which he set up in the Rance, the second defendant, the facts showed that he had a right of occupancy, and could not be dispossessed by the plaintiff. It seems that the Judge of the first Court so considered it. He says, "on the merits, it appears quite clear from the evidence that the mouzah in suit had always been held by the defendant Hurry Muhton and his ancestor, who cleared it of jungle, and brought it under cultivation, digging tanks and making bunds. Hurry Muhton states that he held it as his perpetual ijarah, but the use of the word is evidently erroneous, and intended to mean only a jote or occupancy right." Then in a subsequent part of his judgment, he says, "as therefore it appears that the defendant Hurry Muhton holds under no valid deed, and is merely in possession as a tenant with occupancy rights, I consider that the plaintiff is entitled to a decree, and to be put in

possession of the mouzah in suit subject to the rights of the defendant Hurry Muhton as an occupancy ryot."

The Judge seems to have gradually arrived in his judgment at the finding, that the first defendant was a ryot with a right of occupancy under Section 6, Act X of 1859. But it does not appear, that that was really set up, or that the facts of the case, so far as they have been disclosed, would authorize the Judge in considering him such a ryot. He might well be spoken of as having a jote with occupancy rights, and as being a tenant with occupancy rights, and yet he might not be a ryot within the meaning of Act X, having a right of occupancy, which could not be disturbed, and which would justify the decree of the first Court.

When the case came before the Judicial Commissioner on appeal, he seems not to have directed his attention to the precise question, whether there was a right of occupancy under the Act in the ryot, and whether the first defendant was a ryot, but to have dealt with it in a general way. Speaking of the first defendant's possession, he says, "it has not been shewn by the plaintiff that his possession was under a terminable or limited term, on the contrary it is clear that it was hereditary one, and that he (the first defendant), has consequently a right of occupancy." The Judicial Commissioner, I think, does not anywhere speak of him as a ryot. It appears to me that both these gentlemen, probably impressed with what they thought the hardship of the case on the first defendant (one of them thought that in setting up the title in the Rance the defendant had been made a 'cat's paw' of) did not properly consider whether there was a right under Act X of 1859. They really have not found that there was such a right. I am afraid we cannot say there has been such a finding here as would enable us to determine that there was a right of occupancy in the first defendant, which could not be disturbed, and which would justify the decree that has been made by the Lower Courts.

If there was any probability that, upon the case being remanded, such a right could be established, it is probable we should remand it for that purpose. But looking at the facts in the written statement of this defendant, I do not think it would be of any use to him to have the case sent down to see whether a right of occupancy as a ryot

could not be proved. We must come to the conclusion that the judgments of both the Lower Courts are wrong in this respect, and that the plaintiff must have a decree for possession of the land claimed.

It is not necessary for us to decide, and we do not give any opinion upon the question, whether by the setting up of the title in the Ranee, the first defendant would have forfeited a right of occupancy under the Act, supposing he had acquired one.

The decrees of both Lower Courts must be altered, by awarding to the plaintiff the possession of the land claimed, instead of what has been awarded to him by those decrees.

THE 7TH FEBRUARY 1873.

(Before the Hon'ble J. B. Phear and the Hon'ble W. Ainslie, Judges.)

CASE NO. 293 OF 1872.

*Miscellaneous Regular Appeal from an order passed by the Judge of Gya, dated the 29th September 1872.*

Ram Chunder, .. Decree-holder, Appellant,  
versus

Nund Lall Bose for self } Judgment-debtor,  
and as Mookhtear of }  
Mohendro Nath Bose } Respondent.  
and another ... }

*For Appellant.*—Mr. R. T. Allan and Baboo Mutty Lall Mookerjee.

*For Respondents.*—Baboos Obhoy Churn Bose and Nil Madhub Bose.

There is nothing in the law to prevent the attachment in execution of a decree of a property which forms the subject of an existing suit between the present judgment-debtor and some other party.

*Phear, J., (Ainslie, J., concurring.)*—It appears to us that the Judge has refused execution in this case under the influence of some misapprehension. Sections 212 to 215 of Act VIII. of 1859 prescribe the mode in which application for execution and attachment of property should be made. And section 215 enacts that if the application is regular in all respects, according to the provisions of the preceding sections the

Court shall order execution of the decree according to the nature of the application, that is, according to the particular form of attachment which is asked for.

In this case we understand that the property, which the judgment-creditor sought to have attached, was duly specified, and there was no practical difficulty in the way of attaching it. The Judge refused to attach, solely on the ground, that this property was the subject of an existing suit between the present judgment-debtor and some other party. For this reason the Judge thought that the property only amounted to a contingent right and interest, and could not be declared to be the subject of attachment and sale. It might no doubt be unadvisable, in the interest of all parties concerned, that the sale of a property so situated should be ordered. But it appears to me that there is nothing in this state of things to prevent the property from being attached. It either is the property of the judgment-debtor, or it is not at the present time. If it is the property of the judgment-debtor, the judgment-creditor has a right to have it attached, as he asks to have it: and the judgment-debtor has no right to make any opposition to this. On the other hand, if it is not the property of the judgment-debtor, he has no concern whatever in the matter. The parties to whom the property, which is so sought to be attached, really does belong, if it does not belong to the judgment-debtor, may themselves come in under the course of procedure prescribed by Act VIII., and upon making their rights clear, have the attachment removed. It seems to me that neither in the one alternative, nor in the other, has the judgment-debtor a right to be heard on this question. While, on the contrary, it seems to me that the Judge ought to have ordered execution by way of the attachment which was sought. It will of course remain in his discretion, having regard to all the circumstances of the case and the relations between the parties, to order the sale of the property, when attached, at the fittest and the most proper time.

The appellant must have his costs, pleader's fees two gold mohurs.

THE 11TH FEBRUARY, 1873.

*Present :*

The Hon'ble LOUIS S. JACKSON,  
" " DWARKA NATH MITTER, } *Judges.*

CASE NO. 287 OF 1872.

*Miscellaneous Regular Appeal from an order,  
passed by the Judge of Tipperah, dated the  
31st July, 1872.*

Chunder Nath Misser and  
Shumbhoo Nath Misser,  
decreeholders ... *Appellants,*

*versus*

Gouree Komul Bhuttacharjee  
and others, judgment-debtors, ... *Respondents.*

*For Appellants.*—Baboos Kally Mohun Doss  
and Rashbehary Ghose.

*For Respondents.*—Baboo Nulit Chunder  
Sein.

Judgment-creditors having entered into an arrangement  
by mutual agreement with their judgment-debtors, cannot  
afterwards be allowed to execute their original decree in  
supersession of such arrangement.

*Mr. Justice Jackson.*—The Appellants in  
this case held a decree against the judg-  
ment-debtors. Various applications were  
made to execute the decree, and on one  
of them in September 1869, the sum of  
Rs. 1,000 was paid. Further applications  
were afterwards made on which finally on  
the 16th December 1870, it was arranged  
upon a petition of the judgment-debtors  
and the consent of the decreeholders that a  
further payment of Rs. 1,000 down should  
be made and that the residue of the debt  
should be paid with interest at the rate of  
1 per cent. per month by monthly instal-  
ment of Rs. 125.

The judgment-creditors now seek to set  
aside the arrangement entered into by  
mutual agreement, and execute their original  
decree as if no such arrangement had been  
made. The sole ground on which they make  
this application is that advertising to the  
decision of the Full Bench of this Court  
reported in 18 Weekly Reporter, page 44,  
the agreement would expose them to certain  
consequences, viz., the risk of incurring limita-  
tion, to which if they had been more pru-  
dent they would not have expressed them-  
selves. It appears to me that this is not a  
ground upon which the Court executing  
the decree can be called upon to relieve the

appellants from their solemn, deliberate  
agreement. The parties were quite at liberty  
to enter into such an agreement if they  
thought fit. There was nothing in law to  
prevent their doing so. Even if it were in  
the power of the Court in execution pro-  
ceedings to do that which is sought of it,  
there must be something much stronger  
than the mere want of complete prudence or  
forethought on the part of one of the par-  
ties to induce it to do so. I think, there-  
fore, that the Judge of the Court below was  
quite right in refusing to allow the decree  
to be enforced in supersession of such agree-  
ment.

The appeal is dismissed. We make no  
order as to costs.

THE 11TH FEBRUARY 1873.

*Present :*

The Hon'ble Sir R. COUCH,  
Knight, ... *Chief Justice,*  
and

The Hon'ble F. A. GLOVER ... *Judges.*

CASE NO. 592 OF 1872.

*Special Appeal from a Decision passed by the  
Subordinate Judge of Puredpore in Dacca,  
dated the 10th January 1872, reversing a  
decree of the Moonsiff of Bhangah, dated  
the 31st July 1871.*

Taruck Chunder Poddar  
and others (*Plffs.*) ... *Appellants,*

*versus*

Jodeshur Chunder Koon-  
doo (*Def't*) ... *Respondent.*

*For Appellants.*—Baboo Bhogobutty Churn  
Ghose.

*For Respondent.*—Baboo Chunder Madhub  
Ghose.

One member of a Hindu family being found to be in  
possession of any property, the family being presumed  
to be joint in estate, the presumption is, not that he is in  
possession of it as separate property acquired by him, but  
as a member of a joint family.

*The Chief Justice.*—This suit was brought  
by the plaintiffs to have their rights under  
a *Meras* lease, obtained by their ancestors of  
a certain share of a tenure known by the  
name of Baran Moollah, confirmed and  
declared, and their case was that Eshur  
Chunder, the father of the second defendant,

Brijo Kishore, the father of the first, and Hurrish Chunder the father of the second set of plaintiffs, being three uterine brothers, while living jointly and in commensality, acquired with the aid of their joint funds a Mockurroree Mourosee lease on the 15th of Choit 1264.

The defence set up was that the lease was, in fact, granted by the lessors to Eshur Chunder, after the dissolution of the commensality between the co-parceners, and that, at the time of the granting of the lease there was a verbal stipulation to the effect, that upon the payment of the bonus money the lease would be returned to the lessor, and that the defendant received back the bonus money.

It seems that the issues had been framed by the predecessor of the Moonsiff who tried the case, and that the latter modified them and framed amongst others this, "whether the *Meras* lease in respect of the share of the Mouzah in dispute had been acquired by Brijo Kishore, the father of the first plaintiff, Hurrish Chunder the father of the second plaintiff, and by Eshur Chunder father of defendant No. 2, while they were living jointly and in commensality and had been held by them in joint tenancy, and whether after their decease, the second defendant and the plaintiffs had been jointly in possession of the property, or whether the plaintiffs had been dispossessed of the property in suit by the first defendant;" and secondly, "whether Eshur Chunder, the father of the second defendant, had acquired a *Meras* lease in respect of the property in suit after severance of the commensality with the fathers of the plaintiffs," which was really involved in the first issue.

The Moonsiff then tried the case, and he says in his judgment, "it has been satisfactorily proved that the said Eshur Chunder and his brothers Brojo and Hurrish Chunder held the property in dispute jointly, both while they were living in a state of commensality, and also after a severance of the commensality, and that after their death, the present plaintiff and the second defendant have also held the said property jointly;" and then noticing what is laid down in Mr. Norton's work on evidence, and stating that it appeared that the three brothers were living in a state of family partnership, he says "a heavy burden lies on defendant No. 1 to prove the fact of the separate acquisition of the property in suit, and the

defendant No. 1 has totally failed to discharge the said onus." He then decreed in favor of the plaintiff ordering that he should recover possession of the share which he claimed.

The case came on appeal before the Subordinate Judge, and he after noticing the decree the Moonsiff had made, said—"with reference to the second issue I find that it is admitted on all hands that the *Meras* lease in respect of the property in suit was obtained in the name of Eshur Chunder. Therefore under the precedents quoted in the margin, the onus of proving the fact of the acquisition of the leasehold property by the three brothers, namely, Eshur Chunder Podar, Brijokishore, and Hurrish Chunder Podar, the ancestors of the plaintiffs, with the aid of joint ancestral funds, and at a time when the three brothers were living in a state of family partnership was upon the plaintiffs. I am of opinion that the plaintiffs have failed to discharge the said onus satisfactorily." And he decreed the appeal, setting aside the Moonsiff's decision and ordering the suit to be dismissed.

In his judgment he also said, that it had been proved that the *Meras* lease was acquired by Eshur Chunder who had paid the *bonus* necessary for obtaining it, and as there was no evidence to shew that the fathers of the plaintiffs or the plaintiffs themselves had any interest in the said leasehold estate, it is not at all necessary to put the defendant to strict proof of his title. He therefore threw upon the plaintiffs the burden of proving that the property had been acquired by the family jointly, instead of putting the burden of proof upon the defendant as the Moonsiff had; and the question raised in this special appeal, and upon which, seeing the small amount of evidence there is in the case, the decision of the suit really depends, is, upon which party ought the burden of proof to have been laid.

Now, the judicial committee of the Privy Council, in the case in XII Moore's Indian Appeals, page 523, Neelkishto Deb Burmanno against Beer Chunder Thakoor, has laid down the rule by which this Court must be guided. At page 540, their Lordships say, "The Normal state of every Hindoo family is joint. Presumably every such family is joint in food, worship and estate."



In the absence of proof of division such is the legal presumption; but the members of the family may sever in all or any of these three things. The family, in which a title to a kingdom exists in one member, follows this general law, but it follows it in part only, for the succession to a kingdom is an exception to it, from the very nature of the thing, the family may have property distinct from that to which a sole heirship belongs, and may continue joint." These observations have reference to the particular case before their Lordships, but here they lay it down in most distinct terms, that every Hindoo family is presumably joint in food, worship, and estate; and the same law had been laid down in a previous case in IX Moore's Indian Appeals, page 92, where it is said that the presumption with regard to a Hindoo family is that it remains undivided.

In another case before the Judicial Committee reported in III Moore's Indian Appeals, page 229, Dhurm Dass Paundey against Shama Soondoree Dabee, we find the law laid down which is applicable to the case before us, page 240, their Lordships say, "It is allowed that this was a family who lived in commensality, eating together and possessing joint property. It is allowed that they had some joint property, and there can be no doubt that, under these circumstances the presumption of law is, that all the property they were in possession of was joint property, until it was shown by evidence that one member of the family was possessed of separate property. Such evidence may be received, but their Lordships are of opinion that such evidence has not been given in this case, with regard to any part of the property." ..... "Now what has been relied upon, with regard to a portion of the property, has been chiefly that it was purchased in the name of one member of the family; and that there are receipts in his name respecting it; but all that is perfectly consistent with the notion of its having been joint property, and even if it had been joint property, it still would have been treated exactly in the same manner. We have heard from the highest authority, from the authority of Sir Edward East and Sir Edward Ryan, whose most valuable assistance we have in this case (and it gives me a confidence that I should not otherwise have felt) that the criterion in these cases in India, is to consider from what source the money comes with which the pur-

chase money is paid. Here, there has been no evidence given that the appellant had any separate property, or that it was from his funds that any part of the purchase money was paid; therefore I think, that so far on this part of the case no difficulty can be entertained, and that the whole of the property must be considered as joint property."

Now with regard to what their Lordships say as to the family being possessed of property, and that the presumption of law is that all the property the family is in possession of is joint property, the rule, that the possession of one of the joint owners is the possession of all, would apply to this extent, that if one of them was found to be in possession of any property, the family being presumed to be joint in estate, the presumption would be, not that he was in possession of it as separate property acquired by him, but as a member of a joint family. It being so, until in this case it is shewn that Eshur Chunder had acquired it separately, and it was property which could by law be treated as a separate acquisition, the presumption is that it was the joint property of the family. It was for the person, who set up a different state of things from what is to be presumed, to give evidence of it. It was the duty of the defendant to meet the presumption which arose from the state of the family, and the possession by one of them of the property. That appears to me to be the result of the judgments of the Privy Council which I have referred to.

There is no doubt conflict of decisions in this Court upon this subject. I can see no way of reconciling them. We must follow what has been laid down by the Court of appeal from this Court; and I may observe that in decisions this Court which are in conflict, the judgments of the Privy Council do not appear to have been noticed. In some they have not been noticed at all, in others I do think they have not been noticed in the manner they would have been if the attention of the judges had been directed to them. I have no doubt it frequently happens in this Court, that all the authorities bearing on the subject are not presented to the Court in the argument, and this sometimes leads to a conflict of decisions.

I have said there are various decisions in this Court which cannot be reconciled with the law, which, I feel bound by the judgments in the Privy Council, to lay down.

The case in the *X Weekly Reporter*, page 333, which was quoted to us, is certainly contrary to the decision of the Privy Council. As to the case at page 122 of the same volume, it may be said that facts were found there which rebutted the presumption, and so it cannot be considered as laying down any rule as to the onus of proof. So the case in the special number of the *Weekly Reporter*, page 557, is also contrary to the decision of the Privy Council; I must adopt the judgment of the Court of Appeal rather than the law laid down in that case. The case in *VIII Weekly Reporter*, page 271, is consistent with the decision of Privy Council.

It was argued before us, and reference made to a case in the same volume of the *Weekly Reporter*, page 270, that it was not shewn here that any nucleus of property by means of which this acquisition by Ishur Chunder might have been made, and that at least the plaintiff ought to have given some evidence of that, I must observe that what is said in that about there being a nucleus of property is only a dictum.—No doubt it would be very useful for the plaintiff to shew that, but I cannot agree that he is bound to do it. That dictum seems to me to be inconsistent with the doctrine laid down by the Judicial Committee.

There is one more case which I must notice that is directly opposed to the decision of the Privy Council. It is reported in *I Bengal Law Reports*, page 164, Appellate cases, and also in *X Weekly Reporter*, page 198. With every respect for the learned Judges who pronounced that decision, I feel obliged, by the superior authority of the Privy Council, to differ from it. The law laid down by the Judicial Committee in the case in *XII Moore's Indian Appeals*, does not appear to have been presented to the learned Judges. Probably, if it had been, they would, whatever their own opinion might be on the subject, have considered that they were bound to follow it.

The result of a consideration of the authorities appears to me to be, that the Subordinate Judge was wrong in what he laid down as to the onus of proof. He improperly put upon the plaintiff the onus of proving that, (to use his own words,) "the property was acquired with the aid of joint funds and at a time when the brothers were living in a state of family partnership." That is opposed to the authorities which this Court is bound to follow, and on that

account his decision must be reversed and the case must be sent back to him for re-trial.

The costs of this appeal will follow the result of the suit.

*Mr. Justice Glover*.—I am of the same opinion.

THE 17TH FEBRUARY, 1873.

Present :

The Hon'ble J. B. PHEAR, }  
 „ „ W. AINSLIE, } Judges.

CASE No. 446 OF 1872.

*Special Appeal from a Decision passed by the Officiating Additional Judge of Zillah Tirkoot, dated the 10th October 1871, affirming a decree of the Moonsiff of Durbhanga, dated the 17th June 1871.*

Preyag Dutt Roy, ... (Plff.) Appellant,

versus

Fekoo Roy and others (Defts.) Respondents.

For Appellant. Mr. R. E. Twidale.

For Respondent.—Babu Bamachurn Banerjee.

Plaintiff having been ousted from a Ticca he held on a Zircopeshgee to be paid off by annual instalments sued for the recovery of possession with mesne profits.

Held that a transaction of this kind constitutes a different relation altogether between the parties from that ordinary relation of landlord and tenant, which is contemplated under the words used in Section 27, Act VIII of 1869 B. C.

*Mr. Justice Phear (Ainslie, J., concurring.)*—In this case language has been used in both the Courts below which seems to indicate some little confusion as to the mode in which those suits are to be dealt with in the Moonsiff's Court, which are of such a nature as would formerly have rendered them triable only in the Collector's Court. One Court speaks of the suit being a suit which is to be tried on the Civil Side of the Court as distinguished from some other side, and the other speaks of its being a suit which is to be tried under Act VIII of 1869 B. C. There should I apprehend be no question in the mind of the Court as to which side of the Court is to entertain the suit or under what Act it is to be tried. It was one of the purposes of the Legislature, when it removed the cognizance of certain class of actions from the Collector's Courts to the Moonsiff's Courts, that there should no longer be any question in any case whether the suitor

had invoked the exercise of the right jurisdiction, and whether the Court was competent to do complete justice between the parties. It is the plain duty of the Court when a suit is brought before it to entertain it, and to endeavour to try the matter in question between the parties upon the whole merits. In this instance, no doubt the first material issue raised, and the first issue to be tried, was whether or not the suit is barred by the operation of one or other of the Acts of limitation. And the finding of the Court on that issue would necessarily depend upon the nature of the contest between the parties, namely, upon the question whether the cause of action sued on by the plaintiff is one which falls within the provisions of Act XIV of 1859, or one which falls within the more restricted limitation as to time prescribed by section 27, Act VIII of 1869 B. C., the Courts below have both come to the conclusion that the suit is barred by the operation of this last mentioned section. The words of that section so far as they are applicable to the present case are,—“All suits to recover the occupancy of any land, form or tenure from which a ryot, farmer or tenant has been illegally ejected by the person entitled to receive rent for the same, shall be commenced within the period of one year from the date of the accruing of the cause of action and not afterwards.”

Both the Lower Courts are of opinion, upon the case of the plaintiff, that this is a suit to recover occupancy of land from which he has been illegally ejected by the person who is entitled to receive rent for the same.

On referring to the judgment of the Judge, I find that he describes the plaintiff's cause of action in this wise:—The plaintiff states that 9 annas and 9 gundas in Mouzah Dhanour Koor “were given in Ticca to him by defendants Nos. 2 and 3 at a rental of 100 rupees from 1273 to 1286 F. S. after taking 1400 Zurpeshgee (Sudhowab Patocah) that is by the paying back of the amount in yearly instalments of 100. He further states that defendant No. 1 bought one anna of the right and title in the share in Ticca from defendant No. 2 on 24th Assin 1275 F. S. of which he took possession ousting the plaintiff.”

“The plaintiff now sues for recovery of possession and mesne profits for three years.”

It appears to me that if this rightly

states the plaintiff's cause of action, and it seems on reference to the plaint that it does so, the suit is not simply a suit to recover occupancy of land from which the plaintiff as a tenant has been ejected by the person who is entitled to receive rent for the same, for evidently plaintiff comes into Court claiming a right to enjoy possession of this land for a term of years, upon the footing of a mortgage transaction, he seeks to recover the security for re-payment of the loan which he has advanced, which security had been given to him by the defendants 2 and 3 including the defendant No. 1 vendor, and had been wrongfully taken from him by the defendant No. 1. In truth, it appears according to the terms of the plaint, that during the pendency of this Zurpeshgee lease, no one other than the plaintiff himself is entitled to receive any rent, for it was part of the plaintiff's contract, as he states it, with the defendants 2 and 3 that he should repay himself the money advanced by taking the rent reserved on the lease during that time. It is clear to my mind that a transaction of this kind constitutes a different relation altogether between the parties from that ordinary relation of landlord and tenant, which is contemplated under the words used in section 27, Act VIII of 1869 B. C. It appears to me therefore that the Courts below have made a mistake as to the period of limitation which is applicable to this suit. The Lower Appellate Court has dismissed the suit as I think wrongfully upon the preliminary issue. The judgment must therefore be set aside and the case sent back to the said Lower Appellate Court for trial upon its merits. But if it appear to us before decree is drawn up that the first Court took no evidence, but simply decided upon the preliminary issue, the order will be that the Lower Appellate Court must send the case back to the first Court for trial upon the merits.

Costs must abide the event.

THE 24TH FEBRUARY 1873.

*Present :*

The Hon'ble Louis S. Jackson, }  
The Hon'ble F.A. Glover, } *Judges.*

CASE No. 223 OF 1872.

*Special appeal from a decision passed by the Subordinate Judge of Tipperah, dated the 30th September 1871, reversing a decree of the Officiating Moonsiff of Chowkey Nasseer Nuggur, dated the 19th April 1870.*

Sreemutty Bimola, widow of } (*Plffs*) Ap-  
Lobo Nundee ... } *pellant*

*versus*

Dangu Kansari and another } (*Defts.*) Res-  
 } *pondents.*

*For Appellant.*—Baboo Harymohan  
Chakervartti.

*For Respondents.*—Baboo Nalitchunder  
Sein.

The plaintiffs instituted this suit on the allegation, that one Jagarnath was the owner of 8 annas of the Ijmali homestead in question, that the plaintiff Amrita was his daughter, and that the other plaintiff Bimola was the widow of one Lobo, the son of Jagarnath's second daughter, Sumitra; that they were all along in possession, and were subsequently dispossessed by the defendants, hence this suit for possession of 8 annas share of the Ijmali homestead.

There is no ground for excluding a widowed daughter from her inheritance under the Hindu Law, inasmuch as she can, under the law as it now stands, remarry and have issue.

The defendant Taramoni did not appear in any Court. But the other defendant Dangu Kansari, among other things pleaded that the claim was barred by 12 years' limitation; that Amrita was a widow, therefore she could not be an heir to her father; that Bimola's husband Lobo was born after Jagarnath's death, therefore Bimola was no heir of Jagarnath; the defendant further pleaded that though the plaintiffs occupied a portion of the homestead in question within 1½ or 2 years of this suit, such occupation was of a permissive nature being that of friends.

The Moonsiff found Jagarnath to have been the owner of 4 annas of the Ejmali homestead and not of 8 annas as claimed, and decreed the suit to that extent, holding that limitation did not apply, inasmuch as

the possession of the plaintiffs was admitted as well as proved, and that the defendant had failed to show that they had occupied the homestead only as friends; that defendant had not proved that Amrita was a widow at the time of her father Jagarnath's death, and moreover held that in that case, the second daughter Sumitra, and then her son Lobo and then the other plaintiff Bimola was the sole heir of Jagarnath.

On Dangu Kansari's appeal, the Sub-Judge held that the plaintiffs had not proved their possession within 12 years of that particular site of the homestead that was occupied by Jagarnath, so their occupying another part thereof cannot save their claim, from the operation of limitation, to recover Jagarnath's portion; that Amrita had failed to prove that her husband was living at the time of her father's death, so she was no heir of her father; and that as Lobo, the son of Sumitra had not succeeded, his widow Bimola could not now succeed, inasmuch as the other daughter Amrita was now living. The Subordinate Judge, accordingly, dismissed the whole case of the plaintiffs.

Baboo Harimohan Chakervartti, for the special appellants, contended that the Subordinate Judge was wrong to apply limitation in this case after finding them to be admittedly in possession of some one portion of the Ijmali homestead in question. That the Subordinate Judge was also wrong to hold that Amrita and Bimola were no heirs of Jagarnath; that at any rate Sumitra, capable of producing male issue, was heir to Jagarnath, and then her son Lobo, and after him his widow Bimola were heirs under the Hindu Law.

Baboo Nalitchunder Sein (with him Baboo Doorgamohun Dass), for the special Respondents, contended that the plaintiffs, claiming Jagarnath's portion, must prove possession of that particular portion; that Amrita was no heir of Jagarnath being his widowed daughter; that whether the homestead in question is Ijmali or not ought to be enquired into.

Baboo Harimohan Chakervartti was not heard in reply.

*Mr. Justice Louis S. Jackson.*—It seems to me there was really no valid defence to the plaintiff's suit.

The plaintiffs did not sue to recover as the Subordinate Judge supposes, a particular part of the premises in which Jagarnath the father Amrita and grandfather of the husband of Bimola resided; they simply

sought to establish their right to that portion of the joint family premises which descended by right to Jagarnath. They put their claim a little too high in asking for a half share of those premises when it seems they were really entitled to a fourth share and no more. The Subordinate Judge taking a mistaken view of what as I have just stated, the plaintiffs asked for, went on to say that they had not been in possession of the particular premises of Jagarnath, and consequently their suit was barred by limitation. It is clear that they had been residing as members of a joint family on joint premises and on the occurrence of dispute between them and their co-sharers, they were certainly entitled to come into Court and ask to have their proper share assigned.

As to the exclusion of Amrita under the Hindu Law, there seems to be no ground for that, because although a widow at the time of her father's death, still she could certainly, as the law now stands, remarry and have issue.

I think the decision of the Lower Appellate Court should be set aside, and the Moonsiff's decree for a fourth share restored with costs.

*Mr. Justice Glover.*—I concur.

THE 25TH FEBRUARY, 1873.

*Present :*

The Hon'ble LOUIS S. JACKSON, }  
 „ DWARKANATH MITTER, } *Judges.*

CASE NO. 241 OF 1872.

*Special Appeal from a Decision passed by the Judge of Chittagong, dated the 9th October 1871, reversing a decree of the Moonsiff of Chowkey Rajan dated the 9th May, 1871.*

Magon Mallo ... .. } (*Plff.*) *Appel-*  
 ... .. } *lant,*  
*versus.*

Doola Gajee Koolan and } *Respondents.*  
 another defendants, ... }

*For Appellants.*—Baboo Hurry Mohun Chuk kerbutty and Aukil Chunder Sein.

*For Respondents.*—Baboo Bungseedhur Sein.

A purchaser at a sale in execution of a rent decree against the tenant, whose right and interest in that tenure has been previously sold out, takes nothing.

(The facts of the case appear sufficiently in the judgment of the Court delivered by Mr. Justice Louis S. Jackson.)

Baboo Harimohun Chakarvarti (Baboo Okhilechunder Sein with him) for the special appellant contended first, that the Lower Appellate Court ought to have tried the question of fraud, which had been found in favor of the plaintiff by the First Court; and *secondly*, that the Lower Appellate Court was wrong in holding that land is security for its rent, and that No. 1 defendant's purchase at a sale in execution of a rent decree must prevail over the previous purchase of the plaintiff at a sale in execution of a Civil Court decree, and cited *Dowlut Gazi v. Munshi Munwar* [15 W. R., p. 341]; *Wahed Ali v. Sadiq Ali* [17 W. R., p. 417.]

Babu Bunsidhur Sein (who appeared with the Court's permission, for Babu Grija Sankar Muzamdar) for the special respondent contended, that the question of fraud had not perhaps been taken before the Lower Appellate Court, and therefore it could not be taken here in special appeal; and that at a sale for arrears of rent, the tenure itself was sold, and therefore the purchase therein must prevail against a previous sale.

*Mr. Justice Jackson.*—The decision of the Lower Appellate Court in this case indicates an entire inability to grasp the real facts and questions arising upon these facts as they ought to have been grasped. The plaintiff purchased an Istomoraree jote, that is to say, the right, title and interest of the tenant therein in August 1866 at a sale in execution of a Civil Court decree. This is unquestionable. It is also alleged, and there appears to be really no reason to doubt, that in pursuance of that purchase the plaintiff went to the zamindar and received from him a pottah which pottah the plaintiff sought to register according to law. The zemindar appeared in the Registry Office, and there admitted the execution of the pottah, but did not assent to its being registered; whereupon the Registering Office (why I do not know,) withheld registration. Under Section 36 of the Registration Act, it appears to me that on the registering Officer enquiring whether or not the document was executed by the person by whom it purports to have been executed, if such person admits the execution of the document the plain duty of the Registering Officer is to register the document whether the executant asks or consents to it or not. The plaintiff, no doubt, if well advised ought to have made proper application, to enforce

registration but he did not. After this the zemindar brought a suit for arrears of rent against the tenant who had been sold out, which suit was undefended: a decree was passed, the tenure was put up to sale and purchased by the zemindar himself for two rupees. The zemindar then applied to the Collector to put him in possession, which was done notwithstanding the protest of the plaintiff: the plaintiff therefore brings this suit to be restored to possession.

The Court of first instance found that the zemindar's conduct was tainted with fraud and gave plaintiff a decree. That decree has been reversed by the Additional Judge upon very insufficient reasons. The Judge says.—“The plaintiff's pottah is inadmissible as evidence, and I cannot but think that probability lies on the side of want of genuineness in the Dakhillas. I am certainly unable to determine that plaintiff has, since his auction-purchase in 1866, paid rent to the zemindar defendant—the landlord not getting his rents had a right to look to the occupier of his land and to the land itself as his security, and the plaintiff when his pottah was refused registration had his full opportunity to have that registration enforced, if it was his right.” The Judge altogether overlooks the fact that the zemindar well knew that plaintiff had acquired the tenure by purchase. Notwithstanding that knowledge, three years afterwards, he brought a suit for arrears of rent against a person whose interests he knew had become extinguished and obtained the sale of the tenure on the strength of an *ex parte* decree against such person. If it were necessary to decide the case on that point alone, it would be sufficient to say that the zemindar by such subsequent purchase in execution of a decree against a sold-out tenant had taken nothing and was bound to give way to a *bona fide* purchaser like the plaintiff. More than that under the circumstances of the case, it is quite clear that the conduct of the zemindar is tainted with fraud. He is made aware of the plaintiff's purchase; he actually executes a pottah in plaintiff's favor, goes to the Registrar's Office to register the document and there declines to register it. He then tries to avoid his own act, and ignoring the plaintiff brings a suit against a party whose right he knows to be non-existent. Under such circumstances if the sale under the rent decree had any validity and could prevail over the

previous purchase made by the plaintiff, it would have been the duty of the Court to order the zemindar to reconvey the tenure to the plaintiff, but as I have already stated that is unnecessary as the zemindar took nothing by his purchase. The judgment of the Lower Appellate Court is overruled and that of the first Court is restored with all costs.

THE 25TH FEBRUARY, 1873.

Present :

The Hon'ble J. B. PHEAR, } Judges.  
 ” ” W. AINSLIE, }

CASE No. 486 OF 1872.

*Special Appeal from a Decision passed by the Officiating Judge of Gyah, dated the 31st August 1871, affirming a decree of the Subordinate Judge of Gyah, dated the 20th February 1871.*

Maharanee Indorjeet

Koonwar ... (Def.) Appellant,

versus

Mussummat Pootee Begum (Plf.) Respondent.

*For Appellant.*—Mr. R. T. Allan and Moon-shee Mahomed Yousoof.

*For Respondent.*—Messrs. R. T. Twidale and C. Gregory.

A certain property having been sold in execution of a decree against P. in her representative capacity, and purchased by J., and it having been proved in a suit by P. that the said property was her own, it was held that the sale did not pass the right and title in the property to the purchaser.

It seems to us that the Courts below are substantially right in this case.

Moharanee Indorjeet Koonwar had obtained a decree against the heirs of Kazee Hossein Ali Khan, and attached certain property with the view of having it sold in execution of that decree. Mussummat Pootee Begum, one of the heirs and a defendant in that suit, objected to the attached property being sold on the ground that the decree was made against the defendants in their representative capacity, and could only be executed against the property which had descended to them from Kazee Hossein Ali Khan, whereas the property which had been attached was her own property, come to her from husband.

The Court which was charged with the execution of the decree over-ruled this

objection and ordered the property to be sold. But Mussammat Pootes Begum appealed against this order to the High Court; and the High Court passed a judgment in her favor which contains the following passage as Mr. Justice Macpherson states it in the case reported in volume 12, Weekly Reporter, page 201: "We remanded the case to the Lower Court, saying that Pootes Begum was entitled to have the question determined whether the property now seized in execution came to her from her father or from her husband." "We added,—If she received it from her husband, it cannot, under the terms of the decree, be sold in execution, as that decree is against her as one of the representatives of her father, and the execution of that decree is limited to property of the father found in the hands of the representatives."

That is a distinct decision of this Court upon appeal to the effect that the decree which Maharanee Inderjeet Koonwar had obtained, was a decree the execution of which was limited to the property of her father found in the hands of the representatives, and could not be put in operation against the property of the defendant herself.

It seems that at the time this decree of the High Court in that matter was passed, the sale in execution of the property had actually been effected, and the plaintiff herself had bought the property.

Now, it appears to me that the moment the objection of the defendant to this property being sold in execution of the decree was made, and the Court under the provisions of Section 11 Act XXIII of 1861 entertained that objection judicially, the original suit between the parties whatever its former purpose, was turned into a suit directed immediately to this land itself. This very land was at that stage the matter in suit between the parties; and while that was so, the sale was effected, and Raneé Inderjeet Koonwar purchased. To my mind even had she been a stranger, instead of being also a party to the suit as she was, the purchase made by her under these circumstances would have been a purchase of property *pendente lite* and as such of course subject to the final result of the suit between the parties. The case is, I think, entirely different from the ordinary case of the sale of the property of a judgment-debtor made in execution of a decree which is the subject

of appeal to a higher Court, under circumstances such that the appeal proceedings do not have the effect of staying execution of the decree appealed against. In a case of that kind no doubt the sale in execution may effect a good and valid transfer of property to a purchaser for valuable consideration, even though the decree in execution of which it was made was subsequently reversed, for this simple reason, namely, that at the stage of the proceedings when the sale was made, the decree was a valid decree, and the Court had authority at law to sell the judgment-debtor's property in execution of that decree. But here the very matter in litigation between the parties to the suit at the time when the sale was made, was the right of the Court to sell this property. The highest Court of appeal afterwards determined that the Court executing the decree had no right or authority to sell and convey this property, supposing it to be the property of the defendant by any other title than that of inheritance from her father. I must say that the inclination of my opinion is that the High Court might, under the circumstances of the case, have gone on, even although the sale had been effected, to make the enquiries of fact which were directed to be made, namely, the enquiry whether the property was originally the property of the father Kazee Hossein Ali Khan and from him descended to Pootes Begum, or not, and that it might, upon the issue being determined in favor of Pootes Begum, have set aside the sale as against the plaintiff Maharanee Inderjeet Koonwar who had become the purchaser. I am not prepared even to say that if the purchaser had been an entire stranger, he might not, under the circumstances mentioned, have been put upon the record, in-as-much as under the view I have taken he would have been the purchaser *pendente lite* and therefore one who had placed himself in the shoes of the litigant party. But however this may be, it appears to me clear that the party to the suit who had a decision of the highest Court in her favor to the effect that her property if it had not come to her from her father, could not lawfully be taken and sold in execution of the decree, has an undoubted right to come into the Civil Court as against the purchaser, whoever that purchaser may be, to establish her right and title to the property which has so been unlawfully conveyed away from her. It seems to me that



it would certainly be a great slur upon our procedure if this were otherwise.

Pootee Begum has brought this suit against Ranee Inderjeet Koonwar in her capacity of purchaser, and it appears to me a very poor answer indeed to that suit to say,—this question has already been tried between you and me in the execution proceedings and has been determined in your favor, only that the last step was not taken, namely, the step of giving effect to the final decision of the Court, because the Court held its hand.

In this suit as I understand, the Courts below are unanimous in finding that the property which the plaintiff's execution-creditor bought at the execution sale was the property of Pootee Begum come to her from her husband and not from her father. That being so, it follows from the decision which this Court gave in February 1867, that the sale was not a lawful sale and did not pass the right and title in the property to the purchaser. I think therefore that the Courts below were correct in the view which they have both taken of the plaintiff's right, namely, that the plaintiff in this suit is entitled to recover, and I am of opinion that this appeal should be dismissed with costs.

THE 26TH FEBRUARY 1873.

*Present :*

The Hon'ble R. COUCH, } *Chief Justice.*  
KNIGHT ... }

The Hon'ble F. A. } *One of the Judges of*  
GLOVER, ... } *the said Court.*

CASE No. 712 OF 1872.

*Special Appeal from a Decision passed by the Judge of West Burdwan, dated the 31st of January 1872.*

Siboo Jelya, one of the dfts. ... *Appellant,*

*versus*

Gopal Chunder Chowdhry and others ... } *(Pfs.) Respondents.*

*For Appellant.*—Baboo Nilmadhub Sein.

*For Respondent.*—Baboo Hem Chunder Banerjee.

The provisions of Act X of 1859, do not apply to tanks, nor can right of occupancy be gained in possession of them.

*The Chief Justice.*—This suit was brought for the possession of a tank which the plaintiff alleged he had been dispossessed of.

His case was that he had purchased the tank at a sale in execution of a decree against Rajah Gopal Singh to whom it belonged as a rent-free tenure.

Shiboo Jelya was allowed to come into the suit as a defendant in the suit, and he did not deny that the property in the tank belonged to Rajah Gopal Singh, and that it had been purchased by the plaintiff, but he objected that the Rajah had no *khas* possession, that on the 4th of Joisto 1230, he gave a lease of the tank to this defendant's father, and that the property had since been held accordingly, and that under that lease the plaintiffs were not entitled to *khas* possession.

The issue framed by the Moonsiff was, whether Shiboo Jelya entered into possession of the tank as ancestral jummaye property, or the judgment-debtor had *khas* possession of the same; and in his judgment, he says, "Upon the evidence on the record and the circumstances of the case, it is evident that the defendants have held the tank under a *Jummaye* title from before the sale in execution, and therefore the plaintiffs have no right to *khas* possession." He made a decree to the effect that the plaintiffs were confirmed in possession of their right as owners of the tank; but as the allegation on which they grounded their suit was not proved, while the defendants had made out their case, the plaintiffs were ordered to pay the costs.

From this, there was an appeal to the Judge, who, after stating what the nature of the suit was, and the Moonsiff's decision and the grounds of appeal, said, "I am of opinion that defendant's possession under the lease is not proved, and there is no improbability whatever in Shiboo Jelya and his father having held possession of the tank from year to year by payment of a share of the produce, namely, "fish;" and he decreed the appeal, and reversed the judgment of the Moonsiff.

It has been objected before us, that, although the title which had been set up by the defendant, Shiboo, had not been proved, it appeared upon this judgment that there had been such a possession as gave them a right of occupancy, and therefore the plaintiff ought not to have a decree for possession.

This tank appears to be used only for the preservation and rearing of fish. It does



not appear to have formed part of any grant of land, or that it can in any way be considered as appurtenant to any land held by the defendant. The only thing occupied appears to be the tank itself, and the question is, whether the provisions of Act X of 1859 which would confer a right of occupancy apply to such a tank as this.

No doubt, it may be said that a tank comes under the word land—as land covered with water. But it is to be land cultivated or held; and I think, in considering whether this tank comes within the provisions of Act X of 1859, we must do what was done in *Ranee Doorga Soonderes versus Bibee Oomadutoonnissa*, IX Bengal Law Report, page 101, which was decided myself, Mr. Justice Bayley and Mr. Justice Ainslie on an appeal against the decision of Mr. Justice Glover, the Senior Judge, sitting with Mr. Justice Mitter. The question there was, whether a suit for enhancement of rent of land covered with buildings would lie in the Revenue Courts under Clause 4, Section 23 of Act X of 1859. I was of opinion and Justice Bayley and Mr. Justice Ainslie concurred with me, that in order to see what was meant by land in Act X of 1859, we must look at all the provisions of the Act.

Following that rule in the present case, I think we cannot say that the provisions of Act X of 1859 are applicable to such a tank as this is. For instance, the provision in Section 112 of the Act, which was noticed in that case, respecting the recovery of the rent of the land by distress, is not applicable to such a tank as this. Following that rule, I am of opinion, it cannot be said that a right of occupancy was gained under the Act by the parties in possession of this tank, although for more than 12 years. It is therefore unnecessary to determine the question, whether the defendant by which I mean the intervening defendant (*Shiboo*) not having set up this case, (he having set up a title under a lease which he has failed to prove), can be allowed to resist a decree to the plaintiff for possession. I think this is different from where a plaintiff fails to prove the case which he relies upon in bringing his suit, and is not allowed to set up a different case; because here, supposing the defendant has a right of occupancy, the consequence of giving the plaintiff a decree would be, that the plaintiff having got possession under the decree in this suit,

the defendant would have to bring another suit to get back the possession by virtue of his right of occupancy which would be contrary to the rule that circuity of action is to be avoided. It would not be right to give the plaintiff a possession which he ought immediately lose by another suit; and the proper course would be, finally to decide the rights of the parties in the present suit, or this injustice would be done, that the defendant, although entitled to a right of occupancy, would be entirely deprived of it, by losing possession and not being able to assert his right in any other suit. It would be not only depriving him of a right which clearly belonged to him, but taking away from him altogether the possession of land which he had a right to keep. However, as I have said it is not necessary to determine that question. It is in order that it may be supposed, if this case should arise at some future time, that I assent to the proposition, that the defendant could not set up this now, because he did not do so originally by way of defence that I have made these remarks.

The appeal will be dismissed with costs.

THE 28TH FEBRUARY 1873.

Present :

The Hon'ble F. B. KEMP, AND } Judges.  
" " C. PONTIFEX,

CASE No. 783 OF 1872.

*Special Appeal from a Decision passed by Colonel R. C. Money, Subordinate Judge of Julpigoree, dated 17th February 1872, affirming a decree of the Moonsiff of Bishengunge, dated the 22nd August 1871.*

Niljadie and another (*Dfts.*) ... Appellants,  
versus

Mujeeboollah and others (*Plffs.*) Respondents.  
*For Appellants.*—Baboo Greejashunker Mo-zoomdar.

*For Respondents.*—Baboo Bhuggobuttchurn Ghose.

Held in accordance with a Ruling of the High Court VII W. R. p. 67, that where a Court of first instance decides the issue of Limitation in favor of plaintiff, and the other issues against the plaintiff, and the Appellate Court without passing any judgment on the question of Limitation, remands the case for further investigation, it is competent to the Appellate Court, when the whole case comes before it, ultimately in appeal to try the question of limitation.

It appears that one Sonacoolah, the father of the plaintiffs in the present suit, sued

Niljadee, the widow of one Nazeemooddeen for possession of  $\frac{3}{4}$  of an eight annas share of a Jote which belonged to the said Nazeemooddeen. His claim was decreed. Of the remaining five annas, Niljadee was declared entitled to 1 anna, and Fooljadee her daughter to four annas of the Jote.

Fooljadee having subsequently died, the sons of Sonaoolah, upon the allegation that their father was entitled to  $\frac{3}{4}$  share of the four annas of the said Jote, which Fooljadee had inherited and left, instituted the present suit to recover possession of the share which had devolved by right of inheritance on their father.

The defendants stated that Fooljadee died in Jeyt 1264, and that plaintiff, not having instituted his suit within twelve years of that date, was evidently barred by the law of limitation. They pleaded also that under Section 2, Act VIII of 1859 the suit did not lie.

The Moonsiff found that as there was evidence to shew that Niljadee was alive in Cheyt 1264, the suit was within twelve years from that time, and that therefore the Law Limitation did not apply.

Upon the question of *Res adjudicata*, the Moonsiff held that, as during the appellate stage of Sonnoola's suit, the claim which he had advanced in respect of  $\frac{3}{4}$  of the property which Fooljadee had left at her death was disallowed, no fresh suit could be brought for such share.

Upon this the plaintiffs appealed, and it was held by the Deputy Commissioner of Julpigoree that Section 2, Act VIII did not apply to the suit and therefore remanded it to the Lower Court for trial on the merits. No objection was raised by the defendant under Section 348 Civil Procedure Code to the finding of the Moonsiff on the question of limitation.

On special appeal to the High Court this order was upheld.

The Moonsiff afterwards tried the case on the merits and decreed the claim of the plaintiff.

Upon appeal to the Deputy Commissioner by the defendants, they again raised the question of Limitation and *Res adjudicata* with reference to which the Deputy Commissioner said:—

"The main grounds of appeal are as to Limitation and *Res adjudicata*. Now these points have been disposed of in the former appeal, and the order therein upheld by the

High Court, and I see no reason for again going into them.

The Deputy Commissioner added:—

"It is not in any way shown that plaintiff's appeal is barred by limitation, and in this clearly the onus of proof would be with the late defendant who raised that issue in law, but who have not proved it."

On the merits the Deputy Commissioner upheld the Moonsiff's decision and dismissed the appeal.

In special appeal it was contended on the part of the Appellant, that the Lower Appellate Court was wrong in not trying the question of limitation.

On behalf of the Respondent it was urged, that the defendant not having objected to the finding of the Moonsiff upon the question of limitation under Section 348 Act VIII of 1859, in his first appeal to the Deputy Commissioner, it was not now competent to him to re-open that question. He evidently acquiesced in the finding and could not therefore question it, at such a late stage of the suit. The remarks of the Deputy Commissioner in the latter part of his judgment as to the question of onus of proof where limitation is pleaded, are a mere surplusage and do not at all affect the decision.

*Mr. Justice Kemp.*—THE plaintiffs in this case, special Respondents, sued for two-thirds share of the estate of Fooljadee. The suit was governed by the Mahomedan Law. The plaintiffs alleged that their father was alive at the death of Fooljadee, that he was entitled to a two-third share and Niljadee the Defendant Special Appellant before us to a one-third share. The defence was two pleas in bar; limitation and *res adjudicata*, and on the merits it was stated, that the plaintiffs are not residuary heirs under the Mahomedan law, that there were other heirs alive at the time. Fooljadee died and therefore the father of the plaintiffs was not, as alleged by them, entitled to a two-third share. The Moonsiff in the first instance on the first plea in bar, viz., limitation, was of opinion that it appeared from a petition of the 19th of Cheyt 1264 that Fooljadee was then alive and was then a minor, and that the suit of the plaintiffs which was brought in 1276 was in time from that date, namely, the 19th Cheyt 1264. Here it may be mentioned that the contention of the defendant was that Fooljadee died in Joyith 1264, and that the suit was brought 12 years and three months from that

date. The first Court then on the 2nd issue in bar, that of *res adjudicata*, dismissed the plaintiff's suit.

The plaintiff appealed to the Deputy Commissioner. The Deputy Commissioner found that the suit was liable to be dismissed on the ground of *res adjudicata* and remanded the case. The defendant appealed specially to this Court, and this Court on the 18th of November 1870 dismissed the special appeal, observing that there were other objections made to the plaintiff's title for which a remand had been made, and which objections would be tried on that remand.

The Deputy Commissioner on the question of limitation while admitting that one of the main grounds of the appeal to him was, as to whether the suit was barred or not, found that the question of limitation was disposed of by the High Court in special appeal, and that the onus of proving that the plaintiff's suit was barred was on the defendant. On the merits the Deputy Commissioner concurred with the Lower Court, and gives no separate reasons in his judgment. The only ground of special appeal on which any argument has been raised is, that the Deputy Commissioner is wrong in holding that the question of limitation was disposed of by this Court in special appeal and also farther, that the Deputy Commissioner is wrong in thinking that the onus of proving that the plaintiff's case is barred was on the defendant.

In this case, following the rule of the Privy Council we think, that assuming the contention of the plaintiff was correct, that Fooljaree died in 1866, and the suit having admittedly been instituted 10 years after her death, that the onus was on the plaintiffs to prove that their suit has been brought within 12 years of the date of Fooljaree's death. It is also clear on referring to the decision passed by this Court on special appeal that the question of limitation was not before the Court, and was not decided; the only point before the Court was the appeal of the defendant against the decision of the Court below on the question of *res adjudicata*. In a case to be found in Vol. VII, Weekly Reporter, page 67, it has been ruled that where a Court of first instance decides the issue of limitation in favor of the plaintiff, and the other issues against the plaintiff, and the Appellate Court without passing any judgment on the question of limitation

remands the case for further investigation, it is competent to the Appellate Court, when the whole case comes before it, ultimately in appeal to try the question of limitation. We therefore think that this case must be remanded to the Deputy Commissioner for a finding upon the issue of limitation.

Costs to follow the result.

MARCH 1st, 1878.

(Before the Hon'ble J. B. Phear and the Hon'ble W. Ainslie, Judges.)

CASE No. 282 OF 1871.

*Regular Appeal from a Decision passed by the Subordinate Judge of Sarun, dated the 25th September 1871.*

Gossain Dowlutgeer, (Plff.) ... Appellant,  
versus

Bissessutgoer, (Dft.) ... Respondent.

*For Appellant*—Mr. R. T. Allan, Babus Ounoda Porshad Banerjee, Aubinash Chunder Banerjee, and Rungloobun Seehoy.

*For Respondent*.—Mr. J. T. Woodroffe, Baboo Mohesh Chunder Chowdhry and Moonshree Mahommed Yousuff.

In a suit for succession to a Mohunt, the first and principal question to be determined is, what is the rule prescribed by the founder of the Math, and if none exists, what is the custom or usage followed at the Math, in regard to the selection and appointment of a successor to a deceased Mohunt.

# JUDGMENT.

*Phear, J., (Ainslie, J., concurring)*.—A few prefatory words are necessary to explain the view which we take of the present condition of this case.

In most of the many sects into which the followers of Hinduism are divided, there apparently exists a clerical class, which is commonly separated into two orders, namely, (in European phraseology) the monastic or ascetic, and the secular. The first of these is celibate, and in a great degree erratic and mendicant, but has anchorage places and head-quarters in the maths. The typical math\* consists of an endowed temple or shrine with a dwelling-place for a superior (the mohunt) and his disciples (shreelas).

\* The meaning of the word "math" seems to be cell of a hermit.

# THE LAW OBSERVER.

Vol. II.]

JUNE 15, 1873.

[ No. 6.

## *Administration of Justice.*

LOWER PROVINCES.

WE promised in April last to return to this subject, and we hasten now to redeem our pledge.

Good laws are essential to an efficient administration of justice. But good laws, without an honest and well instructed agency to administer them, must fail to compass the result which may otherwise be fairly expected of them. The questions then which arise, are,—first, have we such laws as may be pronounced to be good, without any reservation, and second, have we an efficient agency to administer them? The first question embraces a subject of no ordinary magnitude and importance, and if we attempted to answer it with any degree of detail, we would certainly exceed the limits which we have assigned to ourselves. We would accordingly reserve our answer to that question for a future issue. Irrespective then of the question of the merits and demerits of our legal code, we will confine ourselves in this paper, to a consideration of the efficiency or otherwise of the agency employed in our judicial department, as well as to the best means of bringing about what we consider to be a reform in our administration of justice.

The officers employed in the (Civil) Judicial Department in the Mofussil, are recruited from among the gentlemen of the Civil Service and the law graduates of our University. The selection of Moonsiffs, however, is sometimes made from among the old pleaders of the Mofussil Courts. These gentlemen are generally ignorant of English.

Let us now see how far the judicial

charge the onerous duties with which they are entrusted.

The civilians, as a rule, when promoted to a District Judgeship, are, if we exclude their noviciate on the magisterial bench, without any previous legal training. A few years' experience as a Magistrate does not serve them in good stead. As ex-Collectors they have certainly some knowledge of the different kinds of land tenures prevalent in the country, and what is called the revenue system, as it was inaugurated in the good old days of John Company Bahadoor. They bring with them also a respectable acquaintance with the vernaculars of the country. But all this knowledge is of little avail to them on the judicial bench. Let us suppose a Judge to be quite *au fait* at the technicology of our Zemindary Sherista,—at the distinctions between a talook, a zemindary, a mohlool and a mudafut, a howala and an onsut talook; a kudemee jote and a sursory tenure, a khodkhast ryot and a pyekhast ryot, a chuckran and a nijjote, &c., &c. Let us suppose him also to be quite familiar with the native languages including the slang so much in vogue among the vulgar. Certainly, in the abstract, these constitute a qualification of a superior order in a European gentleman belonging to the Civil Service, although there is not a Gomastah in the country on Rupees 5 a month, who does not possess this knowledge in a greater degree. But this qualification *per se* is but a poor recommendation in a judicial officer, when it is not accompanied with a complete knowledge of the principles of jurisprudence, equity, &c., and a sufficient training at the bar. A lawyer with a full knowledge of our landed tenures and of the vernaculars would be decidedly an acquisition to the judicial service.

But a mere local knowledge of the description we have alluded to, without a proper legal training and a knowledge of the principles of Law and Equity, can by no means afford a guarantee for an efficient discharge of judicial duties. Besides from the very nature of Hindoo society, it is next to impossible for a foreigner generally to form a correct idea of its constitution. So that, however much a European gentleman may pique himself on his local knowledge, such knowledge, when duly analysed, is discovered to be of very little practical use or value. Thus a mere local knowledge, possessed by a European gentleman without a proper acquaintance with the principles of Law and Equity, can, on no ground, be held to constitute a superior claim to judicial appointments. Civilian Judges have already had a fair trial, and as a rule they do not appear to have succeeded. There may be exceptions, but such exceptions are very rare. One does not always meet with a Holloway or a Louis Stuart Jackson. That is indeed a rare spectacle. Average intellects require a previous special training in the profession of Law. We think accordingly that the system, which now obtains, of selecting District Judges from the Covenanted Civil Service, is based on no sound principle, and therefore is ill-calculated to subserve the ends of justice. Of course, our remarks do not apply to those members of the Civil Service who have not only consumed the orthodox quantity of mutton in one of the several schools of law in the United Kingdom of Great Britain and Ireland, but have really studied the science of the Law with a view to practise it as a profession. Certainly, these gentlemen, we think, to be well-qualified for the bench, and we shall always be glad to hail such appointments with unqualified approbation.

Let us now see how the subordinate appointments in the judicial service are made. As a rule the Moonsiffs are appointed from among the law graduates of our University, and the pleaders of the District Courts, and the ranks of the Subordinate Judges are recruited from

among the Moonsiffs. It is generally said that the Bachelors of Law of our University are as a class a superior set of men, and no exception can be taken to their appointment to Moonsiffships. No doubt they possess some amount of knowledge, general and special, their degree being a sufficient guarantee of the fact. But a mere knowledge of a few principles of Law and of the Regulations and Acts of the Legislature, does not constitute a sufficient qualification for the bench. A young graduate in law fresh from the College, being generally ignorant of the world and its ways, cannot be expected when pitchforked on the bench to ascertain the real facts of a case with a sufficient degree of precision. Not being able generally to distinguish a perjurer from an honest witness, he may be very often misled to believe a false story to be true, and *vice versa*. Unless one has mixed freely with the world for years, and in the course of his dealings has come across with several classes of people, it is impossible for one to form a correct opinion of men from their external bearing and demeanour. Five years' practice at least at the bar ought to be made the *sine qua non* of an appointment into the judicial service. That will certainly afford us some guarantee against a young Moonsiff's being daily betrayed into absurdities in his decisions. If a lawyer of five years' standing or more is not able to sift properly the evidence that may be offered, we may safely pronounce his case to be an exception to the general rule.

At present Moonsiffs are appointed from among the B. Ls. of our University, without any reference to their real attainments or experience as lawyers. A degree from the University is, to be sure, a guarantee to a certain extent of a young man's having gone through a prescribed curriculum of study and no more. To suppose therefore that every B. L., as such, is necessarily qualified to be a Judge, is the very height of *absurdity*. A mere knowledge of a few Regulations and Acts is not all that is required in a judicial officer. His general charac-

ter and intelligence, position in life, must also be taken into account. Social position in this country, notwithstanding the efforts of the Schoolmaster abroad, is still defined by the accident of birth—a fact which perhaps is not generally known to the gentlemen who have the distribution of the “leaves and fishes” of Government at their disposal. They seem to take for granted that when a person has taken his degree at College, he must be presumed not only to have acquired a respectable quantum of knowledge, but also to be born of respectable parents and to be possessed of good moral character. Never was delusion more egregious. However much the educational authorities may flatter themselves on the successful result of their departmental operations, we, who mix freely with the so-called educated gentlemen of our country, can, on no account, for the very life of us, persuade ourselves to believe for a moment that there is any solid foundation for their ludicrous pretensions. What little knowledge is acquired at College is soon forgotten. Thanks to the genius of Cram!! The moment an educated Hindoo enters the world, he thinks it *in fra dig* even to touch his books as if a knowledge of science and literature is incompatible with business habits. If an intelligent young man retains his reading habits after leaving College, he is cried down as a book-worm, and as such considered not at all fit for the business of the world. Such being the general opinion, his prospects in life are all but fair, while others, who are scarcely fit to hold the candle to him, get on swimmingly. These constitute the bulk of our educated countrymen, and the selection of Moonsiffs has to be made from among these. The fact is, as high officials who have patronage at their disposal, have no opportunities of studying the character and attainments of their nominees for judicial employment, the selections do not generally turn out to be the best that could be made. A five minutes’ conversation is all that the Hon’ble Judge in charge of what is technically called the English Depart-

ment, can afford to have with a candidate for a Moonsiffship, and as a Bengallee is remarkably astute in concealing his ignorance, he makes it a point to talk as little as possible, which is generally attributed to the modesty of the scholar. He then gets a Moonsiffship and in the end does not answer the expectations of Government.

What we would recommend is that no body ought to be appointed to a judicial office who has not been known familiarly for a considerable length of time to the Judge in charge of the English department. Whenever he came across candidates for Moonsiffships, if he made it a point to draw them out into a conversation, embracing a variety of topics, professional and general, he would be able in time to form a correct estimate of their attainments, and unless he was satisfied by a pretty long acquaintance that they were fitted by their general and technical knowledge as well as by their general character,—patience and a sense of responsibility in particular—for judicial office, no appointment ought to be conferred on them. But how can the Honorable gentleman afford to have so much time at his disposal to talk to candidates for judicial employ with a view to test their character and attainments? We are fully aware that there is considerable force in this question, but as it is a matter of necessity, it must be submitted to. We cannot say that the time so spent will be spent in vain.

That knowledge, such as is acquired in this country, has filtered down to the lowest stratum of society is a fact too patent to be denied or overlooked. Such being the case, care ought to be taken to select such only as are respectably born and connected, and consequently have a gentlemanly bearing.

If the plan we have suggested were carried out in its integrity, at least 75 per cent. of the candidates would be found to be utterly worthless. What is greatly to be deplored in this country is the absence of that free intercourse in private life between the bench and the native bar, which, as is admitted on all

hands, is considered to be so desirable. In European countries, the bench being recruited from the bar, the Judges always cherish towards the bar that peculiar respect which is so essential to a sound administration of justice. Here, we have nothing in common between the Judges and the Advocates. The former look down on the latter; and the latter think it a stroke of policy to receive all manner of disparaging remarks with the best possible grace they can afford to muster for the nonce, though we are not quite sure whether those remarks do not rankle in their breasts and cause that irritation of feeling which is just the reverse of friendly. The result is far from desirable. A wide gulf separates the Judge from the Advocate. A few of the vakeels who happen to have what is called a respectable practice are known to the Judges by name, while the rest are wholly unknown and probably looked upon as a set of ignorant fellows. Thus it is evident that the Judges know nothing about the relative merits and attainments of the vakeels, and in the absence of this knowledge, it is absurd to expect that a proper person will be selected from among those to fill a judicial office when it becomes vacant. The selection is generally made in a haphazard style, and the result is found to be far from satisfactory.

What then we would recommend, is that none be appointed to the bench who has not received a legal training, and who is not also at the same time qualified by his general attainments and character, patience and a sense of responsibility, to be entrusted with the duty of administering justice between man and man. If this suggestion were followed, the result would be the exclusion from the bench of all those civilians who have not been called to the bar, as well as of all those law graduates of our University who are not possessed of a sound, general and professional knowledge, combined with at least five years' practice at the bar of the High Court. Gentlemen who do not possess a respectable knowledge of English ought on no account to be appointed Judges, as they

cannot be expected to understand the law properly from the translations.

Having now defined the qualification of a Judge, we will endeavour to give a sketch of the judicial system we would propose for what we consider to be a sound and efficient administration of justice.

We would have two grades of Courts only for the Mofussil; namely, the District Court and the Court of the Subordinate Judge. The Courts of the Subordinate Judge or the Courts of first instance are to have cognizance of all suits up to the value of Rupees ten thousand, and to be presided over by a single officer with the designation of a Subordinate Judge. An appeal to lie from these Courts to the District Court, as a matter of right. When the two Courts come to concurrent findings of fact, a special appeal to lie to the High Court on points of law only, as at present, except in suits of the nature of those cognizable by Courts of Small Causes, and involving a value of less than rupees one thousand, in which suits, the decision of the District Court is to be final. But when the two Courts differ, *i. e.*, when the District Court reverses a decree of a Court of first instance on law or facts, a further appeal on law and facts to lie to the High Court.

We would have the District Courts presided over by well-named lawyers, selected from the English or the Native bar, with special reference to the character and attainments of the gentlemen to be so selected. A familiar knowledge of the vernacular and eight years' practice at least at the bar to be an indispensable condition of such appointments. But if the civilian Judges are to be retained at all as under the system which obtains at present, we would strengthen the District Courts by the addition of a second Judge, with the same powers and emoluments, selected from among the barristers or advocates or vakeels. But this involves a question of finance. If the exchequer is full enough to bear the drain, let there be two Judges for each District Court, to



wit, a Civilian Judge and a barrister or a vakeel Judge. But if pecuniary considerations stand in the way of this arrangement, we have no objection to having *one Judge* for the District Courts, but then that one Judge must invariably be a lawyer, *i. e.*, one who has practised as a barrister or a vakeel for at least eight years, and who must possess the necessary qualification we have already indicated.

The District Courts thus constituted to have original jurisdiction in all suits above the value of Rs. ten thousand, together with an appellate jurisdiction as we have defined above. A regular appeal to lie to the High Court as a matter of right in all suits of the value of more than Rupees ten thousand. The minimum value of an appeal to Her Majesty in Privy Council is to remain the same as at present.

Thus it will be seen that by the arrangement here proposed, one glaring anomaly will be removed, in as much as all suits, except those below a value of Rupees one-thousand and of the nature to those cognizable by Courts of Small Causes, will have the benefit of the decision of *three Courts*. Under the present system suits between the value of Rupees five thousand and ten thousand, have *two* stages only; to wit, an original hearing and one appeal. This, to be sure, is an anomaly and ought to be removed forthwith.

The Subordinate Judges we would divide into three grades; those in the first grade drawing a salary of Rs. 1,000; those in the second grade, a salary of Rs. 750, and those in the third grade, a salary of Rs. 500 per mensem. We do not think this plan will involve any considerable additional outlay, as the Moonsiffes as at present constituted with reference to local jurisdiction, may with advantage be reduced in number. We think that ordinarily four or five Subordinate Judges ought, on an average, to suffice for the requirements of a district. If, however, the plan here proposed should on an accurate calculation be found to involve a heavier outlay

than what is made at present; we think the benefits that must inevitably result from an improved system of judicial administration will more than compensate for such an additional outlay.

Courts of Small Causes as at present constituted, may be continued to exist with an enlarged limit of pecuniary jurisdiction; such limit being fixed at Rupees one thousand.

We have sketched a bare out-line of a system of judicial administration, which, if properly worked, cannot but be fairly considered to be an improvement upon the present. It will be seen that we lay peculiar stress upon the character and attainments of the officers to be selected to fill judicial office; as we think the efficiency of a system of judicial administration to be entirely dependent upon the character and qualification of the Judicial staff. Improve the tone of the Judicial service, and you improve the quality of what is now called justice.

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*The Indian Evidence Act 1872,*  
by Babu Kishori Lal Sarkar,  
M.A., B.L., Calcutta.

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THIS is decidedly the best edition of the Indian Evidence Act of 1872, that we have yet seen. The Indian Evidence Act Amendment Act, has been incorporated into the body of the work, and the Indian Oaths Act appended to it. The value of the work has been not a little enhanced by the Notes which consist "of copious apt extracts from text-writers, numerous illustrative cases both Indian and English, appropriate quotations from the reports of the Select Committee and other sorts of explanatory remarks and comments."

Evidently, Babu Kishori Lal Sarkar has spared no pains to remove the difficulties which stared the uninitiated reader of the Act in the face. He has endeavored to make the work acceptable to



the public generally, by placing, as he has placed, in juxta-position with the several sections, all that in any way bears upon them. To the practitioner and the student of law, this arrangement will be found to be eminently useful.

Babu Kishori Lal has also attempted to supply the deficiencies of the Act. We will suffer him to speak for himself.

"The subject of the *weight of evidence* is expressly left untouched by the Act. On question on this subject, the text books will have as much to be resorted to now as before. I have tried briefly to supply this omission in the Act by occasional notes embodying the observations made by the text writers on the topic, and in a few cases by also referring to Rulings of the High Court. Besides these, the book contains some independent Notes also. Here and there

references have been made between analogous and kindred sections to shew the connection between them. An attempt has also been made to indicate in what particulars the new law has differed from the old."

The price Rs. 4 a copy is not, we think, considering the real merit of the work, too high as some may fancy.

WE understand that our remarks on the state of the Moffusil bar contained in our number for April last, have created a misapprehension in some quarters. We are free to confess that our remarks were never intended to apply to the well-educated native gentlemen who are now practising as vakeels in the Courts in the interior of the country. It is a bad bird that fouls its ain nest.

## Correspondence.

### LAND TENURES IN BENGAL.

TO THE EDITOR OF THE "LAW OBSERVER."

SIR,—There is hardly any subject within the range of Indian jurisprudence more difficult of comprehension than that relating to land tenures in Bengal. To the student,—the practitioner, the Judge, the difficulty in the way of forming an accurate idea of some of its cardinal maxims is equally well-known—but of the three, there is none who feels the difficulty so keenly as the Judge. The student takes a speculative interest,—the practitioner thinks and reasons after a particular fashion; but the Judge has to arrive at a definite and practical conclusion. In particular cases, his attempt at unravelling the mysteries of the law of land tenures becomes hopeless, and it is by giving to his decision a colour of what he believes to be equity that he satisfies his conscience.

It must be patent to every person who has made the subject his careful study that the difficulty may be traced to two causes; firstly, to the defective nature of the law, and secondly, to the system of extreme subinfeudation which obtains in the country.

Act X of 1859 was passed under exceptional circumstances. The state of the country was then such that that piece of legislation was a necessity of the times. The Permanent Settlement had wonderfully strengthened the hands of the zemindars, who as matter of course lost no opportunity to ground their ryots down. It was perhaps a special providence which gave to the Bengal ryots, a Halliday and a Currie. Those times, however, are now gone by. The growing intelligence and civilization of the age have now reached the hearths and homesteads of the ryots, and they have, one and all, become alive to their rights and privileges. It was found that during the Indigo crisis, the Nuddea ryots had all a copy of Act X of 1859, wherewith to contest the arbitrary claims of their landlords. It is a great mistake to suppose, as amateur theorists do, that the condition of the ryots is helpless in the extreme. Zemindars' oppression exists even now notwithstanding the rigor of the law; but any body who has personal experience of the nature of the relations between landlords and tenants,

will testify to the fact that the ryots are not as harmless as lambs. Landlords have been kept out of their estate for years without being allowed to collect their fair rents, their gomastas or agents have been put to no end of trouble, and false cases have been trumped up against them. These are stern realities which the records of our Courts of Justice abundantly bear out.

Such being the advancement which the Bengal peasantry have made, it behoves our Legislature to consider whether the existing law should not remain unaltered. Act X of 1859 is a one-sided piece of legislation. It is in favor of the ryots, and in some portions unfair to the zemindars. The present age requires that the law should view the parties in an equal light, and not show undue favor to one at the sacrifice of the other's rights.

Act VIII of 1869 n. c., has made no alteration in the substantive law, and those difficulties which puzzled the best judicial intellects ten years ago puzzle them still. They require solution.

Case-law may be and, in some instances, is a great aid to the Judge in the dispensing of justice, but it cannot wholly eradicate the evils caused by a defective statutory enactment. If then, Judges are expected to distribute substantial justice by administering a particular law—that law must be plain and simple. It is the fashion with politicians of a particular school to denounce the litigious disposition of the people of Bengal, but it is not they who are to blame, but the law which gives them such ample opportunities.

The cursed system of subinfeudation is another cause which causes an irritation of feeling between the landlord and tenant. It would have been an advantage to the country, if the land had been owned and possessed by two parties only, viz., the landlord and his ryot. The zemindar leases out his estate in Putni—the owner of the Putni sublets it in Darputni until subinfeudation is carried to its utmost limits; and as each intermediate lessor tries to make some profit for himself, the ryot has to bear the entire burden at the end. It were exceedingly desirable to do away with this system altogether.

I have above remarked that the defective nature of the law of land tenures is a fruitful source of a great deal of litigation in this country, but subinfeudation is not the

less. The annals of Bengal litigation fully establish how people have been impoverished for attempting to establish an imaginary subordinate right, under the misconception that it was based upon the customary law of the country.

It is our purpose in this article to point out some of the leading provisions of the law of 1869, relating to landlords and tenants which are stumbling blocks in the way of the Judge and the Advocate.

It is a clear case when one has to deal with two parties,—the zemindar and his ryot; but the creation of subordinate Jotes being carried downwards to its furthest limits, an accurate conception of the rights and status of each class of under-tenants it is indeed very difficult to form. Section 6 gives to the ryot rights of occupancy, but whether the ryots' ryot would obtain similar rights is a question of no ordinary difficulty.

The reports show that according to the particular circumstances of each particular case, Judges have expressed their opinion in favor or against the *Koorfa* ryot, nay, in exactly parallel cases conflicting decisions have been passed. In one case it has been held that a *Koorfa's* jote is from the nature of its inception one at-will, and a *Koorfa* cannot acquire a right of occupancy. In another case he has been found to have those rights on no other ground than that he had possession for more than twelve years. If a *Koorfa* jote be one at-will from the very nature of its inception, how can the *Koorfa* ryot obtain rights under Section 6, simply on the ground of occupancy? Whatever may be the views of our Courts be, people in the interior are of opinion that to vest *Koorfa* ryots with rights of occupancy is very unfair to the ryot, and opposed to prevailing usage of the country. While upon this subject, one cannot possibly avoid considering that the omission to regulate by positive law, whether the right of occupancy is transferable or not, has been a fruitful source of litigation, and the High Court ruling that a given jote is transferable or not according to the custom of the locality in which it is situate, has flooded our Courts with conflicting judgments relating to the custom. When therefore the question whether in a given place the custom is for or against the transfer of right of occupancy is on the tapis, the Judges hardly know how to steer their way clear of so many conflicting decisions.

It has been held by the High Court in several cases that no right of occupancy is obtained in regard to lands situated in a town. Kallee Kissen Biswas, appellant, 8 W. R., p. 251.

This ruling and others which take that view of the law will, it is feared, in the end, create much confusion. Once you hold that Section 6 Act VIII of 1869 n. c., applies to land which is the subject of agricultural or horticultural purposes, you place the holders of town-tenures in a state of alarm and uncertainty. The Legislature by enacting Section 6 have conferred a boon on the country. It has given to the Indian peasant a home which a peasant of the highest civilized countries has not. To hold that this noble provision is applicable to ryots in the *Moffussil* and not in towns, is, we think, giving a restricted meaning to the language of the law.

Supposing that it was really the intention of the Legislature to vest only the *Moffussil* ryots with a right of occupancy, the question is,—What will the status of their brethren in towns be? Will they be mere tenants-at-will removable at the option of the landlord? They may have spent money in raising houses on their land, but it is to no purpose. The houses are removable at the landlord's will. True, those ryots occupying brick-built houses in towns will have the relief which equity will stretch to them. They may successfully plead that when the landlord stood by and allowed them to raise solid structures of masonry on his land—he gave an implied assent to their doings. But what will become of the thousands less-fortunately-circumstanced owning *kutchas* houses in towns? They will not be allowed to plead general limitation on the ground of twelve years' possession, as the moment they admit the relationship of landlord and tenant, their possession ceases to become adverse to the landlord.

(To be continued.)

Yours,

A MOONSIFF.

62. A register book of all marriages of which certificates are granted under section sixty-one, shall be kept by the person granting such certificates in his own vernacular language.

Such register book shall be kept according to such form as the Local Government from time to time prescribes in this behalf, and true extracts therefrom, duly authenticated, shall be deposited at such places as the Local Government directs.

63. Every person licensed under this Act to grant certificates of marriage, and keeping a marriage register book under section sixty-two, shall, at all reasonable times, allow search to be made such book, and shall, on payment of the proper fee, give a copy, certified under his hand, of any entry therein.

64. The provisions of sections sixty-two and sixty-three as to the form of the registered book, depositing extracts therefrom, allowing searches thereof, and giving copies of the entries therein, shall, *mutatis mutandis*, apply to the books kept under section thirty-seven.

65. This Part of this Act, except so much of sections sixty-two and sixty-three as are referred to in section sixty-four, shall not apply to marriages between Roman Catholics. But nothing herein contained shall invalidate any marriage celebrated between Roman Catholics under the provisions of Part V of Act No. XXV of 1864, previous to the twenty-third day of February 1865.

## PART VII.

### PENALTIES.

66. Whoever, for the purpose of procuring any marriage, intentionally makes any false oath or signs any false notice or certificate required by this Act, shall be deemed guilty of the offence described in section one hundred and ninety-three of the Indian Penal Code.

67. Whoever forbids the issue by a Marriage Registrar of a certificate by falsely representing himself to be a person whose consent to the marriage is required by law, knowing or believing such representation to be false, or not having reason to believe it to be true, shall be deemed guilty of the offence described in section two hundred and five of the Indian Penal Code.

68. Whoever, not being authorized under this Act to solemnize a marriage without due authority, solemnizes a marriage in the absence of a Marriage Registrar of the district in which such marriage is solemnized, knowingly solemnizes a marriage between persons one or both of whom is or are a Christian or Christians, shall be punished with imprisonment, which may extend to ten years, or (in lieu of a sentence of imprisonment for seven years or upwards) with transportation for a term of not less than seven years and not exceeding ten years, or, if the offender be an European or American, with penal servitude according to the provisions of Act No. XXIV of 1855 (*to substitute penal servitude for the punishment of transportation in respect of European and American convicts and to amend the law relating to the removal of such convicts*), and shall also be liable to fine.

69. Whoever knowingly and wilfully solemnizes a marriage between persons, one or both of whom is or are a Christian or Christians, at any time other than between the hours of six in the morning and seven in the evening, or in the absence of at least two credible witnesses other than the person solemnizing the marriage, shall be punished with imprisonment for a term which may extend to three years, and shall also be liable to fine.

This section does not apply to marriages solemnized under special licenses granted by the Anglican Bishop of the Diocese or by his Commissary, nor to marriages performed between the hours of seven in the evening and six in the morning by a layman of the Church of Rome, when he has received the general or special license on his behalf mentioned in section ten.

70. Any Minister of Religion licensed to solemnize marriages under this Act, who, without a notice in writing, or when one of the parties to the marriage is a minor, and the required consent of the parents or guardians to such marriage has not been obtained, within fourteen days after the receipt by him of notice of such marriage, knowingly and wilfully solemnizes a marriage under Part III, shall be punished with imprisonment for a term which may extend to three years, and shall also be liable to fine.

71. A Marriage Registrar under this Act, who commits any of the following offences:—

(1) knowingly and wilfully issues any certificate for marriage, or solemnizes any marriage, without publishing the notice of such marriage as directed by this Act;

(2) after the expiration of two months from the issue by him of a certificate in respect of any marriage solemnizes such marriage;

(3) solemnizes, without an order of a competent Court authorizing him to do so, any marriage when one of the parties is a minor, before the expiration of fourteen days after the receipt of the notice of such marriage, or without sending, by the post or otherwise, a copy of such notice to the Senior Marriage Registrar of the district if there be more Marriage Registrars of the district than one, and if he himself be not the Senior Marriage Registrar;

(4) issues any certificate, the issue of which has been prohibited as in this Act provided by any person authorized to prohibit the issue thereof,

shall be punished with imprisonment for a term which may extend to five years, and shall also be liable to fine.

72. Any Marriage Registrar knowingly and wilfully issuing any certificate for marriage after the expiration of three months after the notice has been entered by him as aforesaid,

or knowingly and wilfully issuing without the order of a competent Court authorizing him so to do, any certificate for marriage, where one of the parties intending marriage is a minor, before the expiration of fourteen days after the entry of such notice, or any certificate the issue of which has been forbidden as aforesaid by any person authorized in this behalf,

shall be deemed to have committed an offence under section one hundred and sixty-six of the Indian Penal Code.

73. Whoever, being authorized under this Act to solemnize a marriage,

Persons authorized to solemnize marriage (other than Clergymen of the Churches of England, Scotland, or Rome)

and not being a Clergyman of the Church of England, solemnizing a marriage after due publication of banns, or under a license from the Anglican Bishop of the Diocese or a Surrogate duly authorized in that behalf,

or, not being a Clergyman of the Church of Scotland, solemnizing a marriage according to the rules, rites, ceremonies, and customs of that church,

or, not being a Clergyman of the Church of Rome, solemnizing a marriage according to the rites, rules, ceremonies, and customs of that church,

knowingly and wilfully issues any certificate for marriage under this Act or solemnizes any marriage between such persons as aforesaid, without publishing, or causing to be affixed, the notice of such marriage as directed in Part III of this Act, or after the expiration of two months after the certificate has been issued by him;

or knowingly and wilfully issues any certificate for marriage, or solemnizes a marriage between such persons when one of the persons intending marriage is a minor, before the expiration of fourteen days after the receipt of notice of such marriage, or without sending, by the post or otherwise, a copy of such notice to the Marriage Registrar, or, if there be more Marriage Registrars than one, to the Senior Marriage Registrar of the district;

shall be deemed to have committed an offence under section one hundred and sixty-six of the Indian Penal Code.

or knowingly and wilfully issues any certificate the issue of which has been forbidden under this Act by any person authorized to forbid the issue;

or knowingly and wilfully solemnizes any marriage forbidden by any person authorized to forbid the same,

shall be punished with imprisonment for a term which may extend to four years, and shall also be liable to fine.

74. Whoever, not being licensed to grant

Unlicensed person granting certificate pretending to be licensed;

a certificate of marriage under Part VI of this Act, grants such certificate intending thereby to make it

appear that he is so licensed, shall be punished with imprisonment for a term which may extend to five years, and shall also be liable to fine.

75. Whoever, by himself or another,

destroying or falsifying register books.

wilfully destroys or injures any register book or the counter-foil certificates there-

of, or any part thereof, or any authenticated extract therefrom,

or falsely makes or counterfeits any part of such register book or counterfoil certificates,

or wilfully inserts any false entry in any such register book or counterfoil certificate or authenticated extract,

shall be punished with imprisonment for a term which may extend to seven years, and shall also be liable to fine.

76. The prosecution for every offence punishable under this Act

Limitation of prosecutions under Act.

shall be commenced within two years after the offence is

committed.

## PART VIII.

### MISCELLANEOUS.

77. Whenever any marriage has been solemnized in accordance

What matters need not be proved in respect of marriage in accordance with Act.

with the provisions of sections, four and five, it shall not be void merely on account of any irregularity

in respect of any of the following matters, namely:—

(1.)—Any statement made in regard to the dwelling of the persons married, or to the consent of any person whose consent to such marriage is required by law:

(2.)—The notice of the marriage:

(3.)—The certificate or translation thereof:

(4.)—The time and place at which the marriage has been solemnized:

(5.)—The registration of the marriage.

78. Every person charged with the duty of registering any marriage,

Corrections of errors.

who discovers any error in the form or substance of any

such entry, may, within one month next after the discovery of such error, in the presence of the persons married, or, in case of their death or absence, in the presence of two other credible witnesses, correct the error by entry in the margin, without any alteration of the original entry, and shall sign the marginal entry, and add thereto the date of such correction, and such person shall make the like marginal entry in the certificate thereof.

And every entry made under this section shall be attested by the witnesses in whose presence it was made.

And, in case such certificate has been already sent to the Secretary to the Local Government, such person shall make and send in like manner a separate certificate of the original erroneous entry, and of the marginal correction therein made.

79. Every person solemnizing a marriage under this Act, and hereby

Searches and copies of entries.

required to register the same, and every Marriage Registrar or Secretary to a Local Government

having the custody for the time being of any register of marriages, or of any certificate, or duplicate or copies of certificate under this Act,

shall, on payment of the proper fees, at all reasonable times allow searches to be made in such register, or for such certificate, or duplicate or copies, and give a copy under his hand of any entry in the same.

80. Every certified copy, purporting to be signed by the person en-

Certified copy of entry in marriage register, &c., to be evidence.

trusted under this Act with the custody of any marriage register or certificate, or

duplicate required to be kept or delivered under this Act, of any entry of a marriage

in such register, or of any such certificate or duplicate, shall be received as evidence of the marriage purporting to be so entered, or of the facts purporting to be so certified therein, without further proof of such register or certificate, or duplicate, or of any entry therein, respectively, or of such copy.

81. The Secretary to the Local Government and the officers appointed under section fifty-six shall, at the end of every quarter in each year, select from the certificates of marriages forwarded to them respectively during such quarter, the certificates of the marriages of which the Governor-General in Council may desire that evidence shall be transmitted to England, and shall send the same certificates signed by them respectively to the Secretary to the Government of India in the Home Department, for the purpose of being forwarded to the Secretary of State for India and delivered to the Registrar-General of Births, Deaths and Marriages:

Provided that in the case of the Governments of Madras and Bombay, the said certificates shall be forwarded by such Governments respectively directly to the Secretary of State for India.

82. Fees shall be chargeable under this Act for—

receiving and publishing notices of marriages;

issuing certificates of marriage by Marriage Registrars and registering marriages by the same;

entering protests against, or prohibitions of, the issue of marriage certificates by the said Registrars;

searching register books or certificates, or duplicates, or copies thereof;

giving copies of entries in the same under sections sixty-three and seventy-nine.

The Local Government shall fix the amount of such fees respectively;

and may from time to time vary or remit them either generally or in special cases, as to it may seem fit.

83. The Local Government may make rules in regard to the disposal of the fees mentioned in section eighty-two, the supply of register books and the preparation and submission of returns of marriages solemnized under this Act.

84. The powers conferred on the Local Government by sections eighty-two and eighty-three may, so far as regards Native States, be exercised by the Governor-General in Council.

85. The Local Government may, by notification in the official Gazette, declare who shall, in any place to which this Act applies, be deemed to be the District Judge.

86. The powers and functions given by this Act to the Governor-General in Council may be delegated to and exercised by such officers as the Governor-General in Council from time to time appoints in this behalf.

And all such powers and functions may be exercised as regards Native States situate within the local limits of the Presidencies of Fort Saint George and Bombay, by the Governors in Council of those Presidencies respectively.

87. Nothing in this Act applies to any marriage performed by any Minister, Consul, or Consular Agent between subjects of the State which he represents and according to the laws of such State.

88. Nothing in this Act shall be deemed to validate any marriage to which the personal law applicable to either of the parties forbids him or her to enter into.

## SCHEDULE I.

(See Sections 12 and 38.)

## NOTICE OF MARRIAGE.

To

a Minister [ or Registrar ] of

I hereby give you notice that a marriage is intended to be had, within three calendar months from the date hereof, between me and the other party herein-named and described (that is to say) :—

Names.	Condition.	Rank or Profession.	Age.	Dwelling place.	Length of residence.	Church, Chapel, or place of Worship in which the marriage is to be solemnized.	District in which the other party resides, when the parties dwell in different districts.
<i>James Smith.</i>	<i>Widower.</i>	<i>Carpenter.</i>	<i>Of full age.</i>	<i>16, Clive Street.</i>	<i>23 days.</i>	<i>Free Church of Scotland Church, Calcutta.</i>	
<i>Martha Green.</i>	<i>Spinster.</i>	<i>.....</i>	<i>Minor.</i>	<i>20, Hastings Street.</i>	<i>More than a month.</i>		

Witness my hand, this

day of

*Seventy-two*

(Signed)

*JAMES SMITH.*

[ The *italics* in this Schedule are to be filled up as the case may be, and the blank division thereof is only to be filled up when one of the parties lives in another district.]



## SCHEDULE II.

(See Sections 24 and 50.)

## CERTIFICATE OF RECEIPT OF NOTICE.

I,

do hereby certify that on the \_\_\_\_\_ day of \_\_\_\_\_ notice was duly entered in my Marriage Notice Book of the marriage intended between the parties therein-named and described, delivered under the hand of \_\_\_\_\_, one of the parties (that is to say) :—

Names.	Condition.	Rank or Profession.	Age.	Dwelling place.	Length of residence.	Church, Chapel, or place of Worship in which the marriage is to be solemnized.	District in which the other party resides, when the parties dwell in different districts.
<i>James Smith.</i>	<i>Widower.</i>	<i>Carpenter.</i>	<i>Of full age.</i>	<i>16, Clive Street.</i>	<i>23 days.</i>	<i>Free Church of Scotland Church, Calcutta.</i>	
<i>Martha Green.</i>	<i>Spinster.</i>	<i>.....</i>	<i>Minor.</i>	<i>20, Hastings Street.</i>	<i>More than a month.</i>		

and that the declaration required by section seventeen or forty one of "The Indian Christian Marriage Act, 1872," has been duly made by the said (*James Smith.*)

Date of notice entered

Date of certificate given

} The issue of this certificate has not been prohibited by any person authorized to forbid the issue thereof.

Witness my hand, this

day of

*seventy-two.*

(Signed)

This certificate will be void unless the marriage is solemnized on or before the day of \_\_\_\_\_

[The *italics* in the schedule are to be filled up as the case may be, and the blank division thereof is only to be filled up when one of the parties live in an other district.]



## SCHEDULE IV.

(See Sections 32 and 54.)

## MARRIAGE REGISTER BOOK.

Number.	WHEN MARRIED.			NAMES OF PARTIES.		Age.	Condition.	Rank or profession.	Residence at the time of marriage.	Father's name and surname.
				Christian name.	Surname.					
	Day	Month	Year.							
1				James	White	26 years	Widower.	Carpenter	Agra	William White.
				Martha	Duncan.	17 years.	Spinster.	.	Agra	John Duncan.

Married in the

This marriage was solemnized between us { James White, } in the presence of us { John Smith, }  
 { Martha Duncan, } { John Green. }

## CERTIFICATE OF MARRIAGE.

Number.	WHEN MARRIED.			NAMES OF PARTIES.		Age.	Condition.	Rank or profession.	Residence at the time of marriage.	Father's name and surname.
				Christian name.	Surname.					
	Day	Month	Year.							
1				James	White	26 years.	Widower.	Carpenter.	Agra	William White.
				Martha	Duncan.	17 years.	Spinster.	...	Agra	John Duncan.

Married in the

This marriage was solemnized between us { James White, } in the presence of us { John Smith, }  
 { Martha Duncan, } { John Green. }

## Privy Council.

*Judgment of the Lords of the Judicial Committee of the Privy Council, on the Appeal of Bodh Sing Doodhooria and another v. Guneschunder Sen and others, from the High Court of Judicature at Calcutta: delivered 27th March 1873.*

*Present:*

SIR JAMES W. COLVILLE.

SIR BARNES PEACOCK.

LORD JUSTICE MELLISH.

SIR ROBERT P. COLLIER.

SIR LAWRENCE PEELE.

1. Held that the provisions of Sec. 260 Act VIII of 1859 cannot be taken to affect the rights of members of a joint Hindoo family who by the operation of law and not by virtue of any private agreement or understanding are entitled to treat as part of their common property an acquisition however made, by a member of the family in his sole name if made by the use of the family funds.
2. Held that the mere fact of a member of a joint Hindoo family when trading on his separate account being permitted by the family to appear to the world as the sole owner of certain estates, and so to obtain a fictitious credit cannot be the foundation for a defence that the other members of the same family have forfeited their right to assert their titles to the same estates against purchasers in execution of a decree against the recorded proprietor.

On the 21st of November 1864, the Appellants became the purchasers, at an execution sale, of the right, title, and interest of one Ramsoondur Sen in two distinct estates, viz., Shahjehanpore and Cossipore. Both had been attached by one Inderehunder Doogur in execution of a decree which he had obtained against the representatives of Ramsoondur in a suit commenced against that person in his lifetime for what is admitted to have been his separate debt. The price paid by the Appellants would have been adequate if the judgment-debtor had been the sole owner of the properties purchased. In August 1865, the respondents, representing themselves to be the persons who jointly with the sons of Ramsoondur, his brother Ramchunder, and one Benoderam Sen constituted a joint and undivided Hindoo family; and alleging that the properties so purchased formed part of the joint estate of that family; brought the suits out of which this appeal has arisen, in order to recover both estates minus the assumed shares of Benoderam, Ramsoondur, and Ramchunder therein. And the first question for their Lordships' determination, is whether there are sufficient grounds for disturbing the conclusion to which both the Indian Courts have come, viz., that the properties in dispute were, in fact, part of the joint family estate.

It is not disputed that Ramsoondur was a member of this joint and undivided family. The status, however, of the family was peculiar. Mr. Justice Loch says (and neither party has disputed the accuracy of the description), "The evidence of the witnesses and of those members of the family who have been examined, clearly shows that though the family were joint in food, and at particular seasons of the year lived together in the family dwelling-house at Koredha, they also had separate dealings and funds of their own. The facts thus brought to our attention, render it impossible for us to look upon the family as a joint Hindoo family in the ordinary sense of the term, that is, as a family having all things in common; all acquisitions being made from the joint funds of the family, and all members being entitled to share in the benefits of any property held in the name of any member of the family. It is clear to us from the evidence that while the family have some ancestral property in joint possession, some of the members of the family acquired separate property from their own funds and dealt with it as their own without reference to the other members of the family." Such a state of things may in their Lordships' judgment be fairly held to weaken, if not altogether to rebut, the ordinary presumption of Hindoo law as to property in the name of one member of a joint family; and to throw upon those who claim, as joint property, that of which they have allowed their co-parcener, trading and incurring liabilities on his separate account to appear to be the sole owner; the obligation of establishing their title by clear and cogent evidence. There can be no doubt that, if the evidence adduced by the respondents, the plaintiffs in the suit, be believed, there is enough to prove their case. And both of the Indian Courts have found in their favour. The two Courts have, however, differed considerably in their appreciation of parts of the evidence; and the decision of the High Court is based upon narrower grounds than that of the Principal Sudler Ameen.

The following are undisputed facts concerning the two estates: Shahjehanpore, or at least that portion of it which is in question in this suit, was the zemindary of one Rajah Soorjnaraia Sing. At various dates before 1859 he had granted a putnee of part, and several ijarahs of other parts, of this estate in the name of Ramsoondur, and had

assigned the rents reserved by these ijarahs, by way of security for certain advances ostensibly made to him by other members of Ramsoondur's family. On the 4th of July 1859, the zemindary which has been attached at the suit of other creditors was put up for sale, and was knocked down to Ramsoondur as the highest bidder. He was afterwards put into possession of it, and from that time until the date of his death, his name stood in the Collector's register as that of the sole registered proprietor. It has been admitted at the bar that there is no question in this suit touching the putnee or other interests acquired in the name of Ramsoondur before this execution sale. The only question is, whether the zemindary interest which was then sold, became, by virtue of that sale, the separate property of Ramsoondur, or part of the joint property of the family.

Of Cossipore, a four-anna share belonged to one Kissoreemounee Dossee, the remaining 12 annas standing in the name of Shihb-ram Dey, who has been called as a witness in the cause. In 1855, the four-anna share was purchased in the sole name of Ramsoondur Sen, and on his petition his name was substituted for that of the vendor as the proprietor of this share in the Collector's book. In April 1856, the interest of Shihb-ram Dey was, on the suggestion that it had been purchased by Ramsoondur, also transferred into his name, and he was thenceforward, until the time of his death, the sole registered proprietor of the whole property.

Ramsoondur died in December 1863, pending the suit in which the execution, which is the foundation of the Appellant's title, issued, but before judgment had been recovered therein. He left as his heirs two infant sons, and, on the 15th of January 1863, his brother, Ramchunder, obtained a certificate of administration under Acts 40 of 1858 and 27 of 1860, empowering him to manage the estate of the deceased. In his application for this certificate, Ramchunder had stated that his brother's property in debts, zemindaree, trade, cash, and Company's paper, was worth about 50,000 rupees. On the same 15th of January, Benoderam Sen, the eldest member, and manager of the joint family, presented two petitions to the Collector of Zillah Moorshedabad, praying in the one that Shahjehanpore, in the other, that Cossipore might be transferred into his name, on the allegation that

each had been purchased by him in the name of Ramsoondur, and therefore that he was the true owner thereof. In February 1863, Ramchunder, as manager of Ramsoondur's estate, filed petitions admitting the title of Benoderam, and, on the 26th of May 1863, orders were made that the name of Benoderam should be recorded instead of that of Ramsoondur as that of the proprietor of both estates.

In June 1863, judgment was recovered against the estate of Ramsoondur in the suit of Inderchunder Doogur, and both estates were afterwards attached as part of the property of the judgment-debtor. It follows, from what has been just stated, that both when so attached stood in the name of Benoderam.

Thereupon Benoderam came in to set aside the attachments. His claims were dealt with separately according to the provisions of the 246th section of the Code of Civil Procedure. In each case he claimed to be the sole proprietor of the whole estate and, as such, entitled to have the attachment removed. Both claims were dismissed by separate orders, dated the 20th of September 1864, which directed the property claimed to be sold. The usual proclamations of sale were made on the 23rd of September, and the execution sale took place on the 21st of November 1864.

It may be well, before considering the grounds upon which the two Indian Courts have held the estates in question to be the property of the joint family, to dispose of a point taken by the Appellants which applies only to Shahjehanpore. The Appellants contend that, whatever be the weight of the evidence as to the real nature of the purchase, the title of Ramsoondur to this estate as his separate property must prevail, by reason of his having purchased it at an execution sale held after Act VIII of 1859 (the Code of Civil Procedure) had come into operation; and by force of the 260th section of that Statute, which provides that "any suit brought against the certified purchaser on the ground that the purchase was made on behalf of another person, not the certified purchaser, though by agreement the name of the certified purchaser was used, shall be dismissed with costs." Their Lordships will not inquire whether there is sufficient proof that Ramsoondur, who purchased at an auction sale held a few days after the Act came into operation, did obtain a certi-

ificate under the Act, or of its terms, if he did obtain one; because, assuming him to have been the certified purchaser within the meaning of the Act, they are of opinion that the provisions of the section do not apply to such a case as the present. They were designed to check the practice of making what are known as benamie purchases at execution sales, *i. e.*, transactions in which A secretly purchases on his own account in the name of B. Their Lordships think that they cannot be taken to affect the rights of members of a joint Hindoo family, who by the operation of law, and not by virtue of any private agreement or understanding, are entitled to treat as part of their common property an acquisition, howsoever made, by a member of the family in his sole name, if made by the use of the family funds.

It need hardly be observed that, on the trial of the issue now under consideration, the principal fact to be ascertained was the source from which the purchase money of the property in question was derived, *i. e.*, whether it came from the common family chest at Koredha in Beerbhoom; or from the separate funds of Ramsoondur employed by him in carrying on his business, admitted to be separate, at Khagra near Moorshedabad. The evidence adduced by the Respondents in support of their claim consisted mainly of a large body of oral testimony; of certain books and accounts kept at the family house at Koredha, being part of the joint family accounts; of the separate books and accounts of Ramsoondur kept at Khagra; and of letters purporting to be letters which had passed between him and Ramkristo, the son of Benoderam being together at Khagra, on the one side, and Benoderam residing at Koredha, on the other. The Principal Sudder Ameen treating the whole of this evidence, whether oral or documentary, as trustworthy, came to the conclusion that the plaintiffs had established their case. The Judges of the High Court appear to have considered that the letters on which the Principal Sudder Ameen had relied were not admissible in evidence against the defendants, the appellants; to have found reasons for discrediting the accounts; but to have held that, nevertheless, the finding of the Lower Court was capable of being supported upon the oral testimony viewed by the light cast upon it by the conduct of the parties.

If it were clear that the Judges of the High Court were right in rejecting the letters, and in treating the accounts as untrustworthy, the correctness of their finding would no doubt have to be determined by the sufficiency of the grounds on which they have rested it. Even in that case their Lordships, though unable to adopt the inference which the learned Judges have drawn from the conduct of Ramchunder and Benoderam; or altogether to concur in other parts of their reasoning, would have felt great difficulty in disturbing their finding, inasmuch as both Courts are agreed as to the credibility of the plaintiffs' witnesses. Their Lordships, however, are of opinion that the letters, if proved as the Principal Sudder Ameen has found them to have been, were clearly admissible in evidence against the appellants who claim under Ramchunder.

It was said that the Judges of the High Court have treated these letters as not duly proven. But it appears to their Lordships that those learned Judges, thinking that the documents would not, if proved, be admissible against the appellants, never addressed their minds to the sufficiency of the proof. The judgment on that point of the Principal Sudder Ameen, a native Judge, dealing with letters in the native character, and purporting to have passed between natives, is, in their Lordships' opinion, of very great weight. The letters, moreover, afford internal evidence that they have not been concocted for the purposes of this suit. And since those with which Ramchunder has been directly connected, by proof of handwriting or otherwise, clearly show that he and Ramkristo were acting jointly on behalf of the family in the purchase of Shahjehanpore, the letters of Ramkristo written in the course of the same transaction seem to be also admissible; and the whole correspondence affords the strongest confirmation of the statements made by the plaintiffs' witnesses.

Again, their Lordships are not satisfied that the objections taken by the Judges of the High Court to the accounts, are such as ought to deprive them of the credit which the Principal Sudder Ameen (possibly a more competent Judge of native books of account than any European can be), gave to them. A distinction is no doubt to be taken between those accounts. The family accounts, taken by themselves, are admissible only as

corroborative evidence. But the private accounts of Ramsoondur, produced by his brother from the Khagra Kotee may, if genuine, be direct evidence, in the nature of admissions on his part, against the Appellants. There are entries in the latter which strongly support the plaintiffs' title. And these are not open to some of the objections taken by the High Court to the family accounts; particularly to one which their Lordships may observe they do not consider to be by any means conclusive, viz, one to the effect that the last mentioned accounts, or some of them, were produced by Benoderam in support of his claims to the sole ownership of the estates. Ramsoondur's grant to Surasuttee Dabce, at p. 698 of the record, also affords some corroboration of the plaintiff's case as to Shahjehanpore.

Regarding Cossipore, it may be observed that although much of the plaintiff's documentary evidence, and in particular the letters, have no bearing on the claim to this estate, the direct evidence of its having been acquired as part of the joint family property is stronger than that relating to Shahjehanpore. Shilbram Dey, who has been treated by both Courts as a witness deserving of credit, has distinctly sworn that the twelve-anna share in this estate which once stood in his name was purchased in his name with the family funds, and on account of the family; and that no consideration passed when it was transferred from his name into that of Ramsoondur. The High Court has found that before this benam purchase, the family was interested as putneedars in this estate; and every probability is, therefore, in favour of the conclusion that the direct evidence given to prove that the purchase of the other four-anna share in the estate was also a family transaction, is true.

Their Lordships are of opinion that the evidence so given on the part of the plaintiffs, is too strong to be outweighed by the inferences to be drawn from the conduct of Benoderam and Ramsoondur in the matter of the claims advanced by the former, or from the conduct of the family in allowing Ramsoondur, on the occasion of giving security to the Collector to state that these properties belonged to himself without co-sharers. Their Lordships will afterwards consider how far the representations involved in these last-mentioned transactions (if false) affect the right of the plaintiffs to succeed in this suit. In determining whether, in point of fact, the pro-

perty was joint or separate, they can only be treated as in the nature of admissions inconsistent with the title now asserted; and, viewed in that light, they do not seem to their Lordships materially to impair the strength of the case made by the plaintiffs.

On the whole, then, their Lordships, after full consideration of the arguments for the appellants, and notwithstanding the omission to call or account for Ramkristo, have come to the conclusion that the finding of the two Indian Courts, to the effect that both estates were purchased with joint family funds, and became joint family property, ought to be affirmed.

If this be so, the next question to be considered is, whether the plaintiffs have forfeited their right to assert their title against the appellants by reason of their own conduct, or the acts of any of those with whom they are connected.

Those who set up such a defence are bound to show clearly both the facts on which it is founded, and that the legal consequences on which they insist necessarily flow from those facts. In the course of the argument there was some want of precision upon this point.

The mere fact that Ramsoondur, when trading on his separate account, was permitted by the family to appear to the world as the sole owner of the estates, and so, perhaps, to obtain a fictitious credit, can be no foundation for such a defence. It may be an unfortunate consequence of the Hindu law touching the joint and separate property of members of an undivided family, but it is one of which all who deal with a Hindu trader must take their chance. Nor can greater effect be given to the misrepresentation made by Ramsoondur, probably with the concurrence of the adult members of his family when he gave security to the Collector. Such a misrepresentation might possibly have been used as an estoppel against the family, had any question in respect of the security arisen between them and the Collector. But it has no bearing upon the present suit except as an admission, in which light it has been already considered, or as an instance of tortuous dealing, which affects the general credit due to the plaintiffs. It was not upon the faith of that representation that the appellant purchased.

The foundation, therefore, of the defence is to be found, if anywhere, in the acts done after Ramsoondur's death, and before the sale.

The first of these was the transfer of the estates into the sole name of Benoderam, on his application, and with the consent of Ramchunder. Their Lordships think it desirable, before considering its effect, to state their view of the nature of this transaction. They cannot but regard it as a contrivance, between Benoderam and Ramsoondur, at least, to put the estates beyond the reach of Ramsoondur's creditors, and therefore fraudulent as against those creditors. They do not impute to Benoderam or to Ramchunder any intention to defraud either the children of Ramsoondur or any other member of the joint family. But Ramsoondur was known to have died indebted; judgments against his estate, if not actually recovered, were imminent, and the only practicable mode of putting these properties wholly beyond the reach of his creditors was by treating them not as family property in which he would have a seisable interest but as the property of Benoderam alone. In furtherance of this scheme Benoderam, when the estates were attached, filed his claims. If those claims had been successful, the attachment would have been removed, and this execution altogether defeated. If, on the other hand, a claim had been made, according to the truth, on the ground that the estates were joint family property, the execution must have gone on, though with notice to all concerned that such a claim had been made. The dismissal of Benoderam's claims became final by his failure to bring a suit to establish his alleged rights within one year from the date of the orders. But the orders themselves do not state the precise grounds of dismissal; and though they negative the title set up by Benoderam, they in no way affirm that Ramsoondur was the sole owner of the properties. And the depositions of the three witnesses from page 412 to 416 of the Record, show pretty clearly that the case made by the decree-holders in resisting Benoderam's claim to Shahjehanpore was rather that the estate was family property in which Ramsoondur had an interest as co-parcener, than that it belonged to him alone.

How then do these proceedings affect the right of the plaintiffs to assert against the appellants the title to the estates which they have been shown to possess. They might be estopped, if it were shown that they had represented Ramsoondur to be the sole owner of the estates; and that the

appellants had purchased on the faith of that representation. But it is impossible from the proceedings in question to extract any such misrepresentation; even if the plaintiffs on the record are to be held to be bound by every act and statement of Benoderam.

Again, is their right affected because when, Benoderam put forward a false claim, they did not formally prefer the true one? There is nothing in the code of procedure which made it imperative on them to do this; the claim, if made, could not have stopped the execution sale altogether.

The highest ground on which the appellants can put their case is, that Benoderam misled them by his fraudulent attempt to defeat the execution; and that the whole family is bound by his acts. It is not necessary to decide how far Benoderam and Ramchunder, who are not parties to this suit, might be affected individually by these proceedings, if they were suing to recover their respective shares. On the present record it must be held that their shares have passed to, and are now vested in the appellants. Their Lordships have felt some doubt whether the respondents, suing as members of a Hindoo family, still joint and undivided, for property which, if recovered, will presumably again fall again into the common stock of that family, might not have been shown to be bound by the acts of Benoderam, whether of omission or commission, and responsible for the consequences of them. But they are of opinion that a defence intended to be founded on such a joint responsibility, should be far more clearly pleaded and proved than it has been in this case. How far the plaintiffs on the record have been parties, to, or are affected in law by Benoderam's proceedings, and to what extent, if at all, the appellants were misled by those proceedings are questions which have never been fairly raised or tried in the Courts below. This was so found, and, as their Lordships think, correctly found, by the Principal Sudder Ameen.

Their Lordships are, therefore, of opinion that the second point taken by the learned Counsel for the appellant is no answer to the suit, and they must humbly advise Her Majesty to affirm the decrees under appeal, and to dismiss this Appeal with costs.



## In the High Court of Judicature at Fort William in Bengal.

THE 27TH FEBRUARY, 1873.

Present :

The Hon'ble T. B. KEMP, }  
" " C. PONTIFEX, } Judges.

CASE No. 780 OF 1872.

*Special Appeal from a Decision passed by the Judge of Rajshahye, dated the 16th February 1872, affirming a decree of the Subordinate Judge of Patna,\* dated the 25th March 1871.*

Jusseemuddeen Biswas, plaintiff... Appellant,  
versus

Hurresondoree Dossee and  
others, defendants ... Respondents.

*For Appellant.*—Mr. J. T. Woodroffe, Baboos  
Mohiny Mohun Roy and  
Issur Chunder Chucker-  
butty.

*For Respondent.*—Baboos Sree Nath Doss,  
Bhogobutty Churn Ghose  
and Gopal Chuander  
Chuckerbutty.

A deed in which it was stipulated that if the money borrowed was not paid on or before a certain date, the borrower would execute a putnee lease of certain properties specified. The borrowed being considered as the *bonus*, and that if the sum borrower should not execute a Putnee Potta, the deed should be counted as a Potta, was held to be a contract to create a putnee and that in the event of the money not being paid on or before the date mentioned, the lender was entitled to hold possession of the properties redeemable upon payment of the sum borrowed with interest from the date of the advance.

*Mr. Justice Kemp.*—The plaintiff is the Special Appellant.

The case turns upon the construction of a deed, dated the 30th Pous 1274.

The Special Appellant contends, that according to the terms of the deed and the intentions of the parties, the Courts below ought to have treated the transaction as a putnee lease from the 2nd Bysack 1277, and that they were wrong in holding that the instrument was one of conditional sale within the meaning of Regulation 17 of 1806.

The terms of the deed may be briefly stated thus.

Haranund Bhuttacharjee and Rutnessur Pal Chowdhry borrowed 1625 Rupees from the plaintiff on the 30th of Pous 1274 B. S., no interest is charged, and it is stipulated that the sums borrowed is to be paid in the

lump on the 30th Choyte 1276 B. S. that if the money borrowed is not paid on or before the 30th of Choyte 1276, the defendant shall execute a putnee lease of certain properties set forth in the deed, the original sum borrowed, or Rupees 1625 being considered as the bonus for such lease; further that if the borrowers do not execute a putnee pottah, this deed shall be counted as a pottah as dating from the 2nd Bysack 1277. Further that if, owing to the sale of the parent estate by the borrowers failing to pay the Government revenue, the putnee should fall with the parent estate, then the original sum borrowed was made recoverable from the sale proceeds of the parent estate. Then there is a further stipulation that if during the term prescribed for the payment of the amount borrowed or from the 30th Pous 1274 to the 30th of Choyet 1276, the parent estate be sold and no putnee can be created, then the amount borrowed with interest and costs; is to be recovered from the other movable and immovable properties of the borrowers.

The plaint sets forth that the money was not paid, and that the borrowers have not executed a putnee lease. The suit is therefore brought for possession of the properties mentioned in the deed as comprising the the putnee tenure.

Before the suit was brought Rutnessur Pal-Chowdhree, one of the debtors, died leaving a widow Hurro Soonduree, who has been made a defendant.

Hurro Soonduree's answer was briefly to the effect that the conditions in the deed as to granting the putnee were in the nature of a penalty; that the plaintiff ought to have served her with a notice to pay; that a suit for the money borrowed might lie, but not one for the specific performance. The defendant Haranund Bhuttacharjee denies the execution of the document, and states that Rutnessur Pal-Chowdhree, though his servant, had no authority from him to enter into any such contract, and that the properties mentioned in the deed belong to him Haranund Bhuttacharjee and not to Rutnessur Pal-Chowdhree.

The Judge finds that the deed is one of conditional sale and not a simple contract. That the plaintiff was bound by law to give the defendants notice of foreclosure under Section 7 Regulation 17 of 1806, and not having done so, a suit for possession will not

lie. The suit of the plaintiff was therefore dismissed.

The questions raised in the answer of the defendant Haranund Bhuttacharjee were not decided by the Judge. There has also been no finding as to the value of the Putnee properties.

Looking to the terms of the deed and the intentions and conduct of the parties, we are clearly of opinion, that we ought to declare that the plaintiff is entitled to possession of the properties recited in the deed, on the footing of a putnee, such possession to commence from date of suit.

The plaintiff obtained no interest whatever on the sum advanced, *viz*: on Rupees 1625 from the 30th of Pous 1274 to the 30th Choyte 1276, and the margin of profit reserved to the plaintiff as Putneedar according to the deed was only 45 Rupees odd, a very inadequate return for the money lent. It is true that the profit is now estimated by the plaintiff to amount to Rupees 200 per annum, but even that sum would be only a little over 12 per cent. on the sum borrowed, to say nothing of the fact that for two years the plaintiff got no interest at all for his money. The instrument has been found by both Courts to be genuine, and there has been no offer of payment of the sum borrowed.

The proprietary title of the defendants as zemindars is not extinguished by this deed. The plaintiff becomes their putneedar just in the same way as if he had taken a putnee lease paying a bonus of 1625 Rupees. The transaction is not a conditional sale, but a contract to create a putnee in favor of the plaintiff on a certain date, and for the certain consideration of 1625 Rupees unless that sum be paid without interest on a particular date.

Regulation 17 of 1806 applies to conditional sales which are to become absolute on the happening of certain conditions. If a mortgagee be put in possession, with the enjoyment of the usufruct in satisfaction of the debt, in such case before the sale can become absolute, it would be necessary for him to foreclose under the provisions of the above regulation.

We think that the Courts below were clearly wrong in dismissing the plaintiff's suit in its entirety. The plaintiff is entitled to relief even though he may have asked for some thing to which he is not strictly entitled. The plaintiff though not

entitled to an irredeemable putnee, is entitled to hold possession, even supposing that in consequence of the value of the putnee lease stipulated for by the contract greatly exceeding the sum of 1,625 Rupees (which question although evidence has been adduced by Hurrosoonduree that the assets are from 600 to 800 rupees. has not been tried by the Lower Court), the Court might think it equitable to relieve Hurrosoonduree from the putnee upon payment of the sum of rupees 1,625, with proper interest from the date of the advance.

With reference to the defendant Haranund Bhuttacharjee, who has been made a respondent, as there has been no finding as to his title, and whether he gave Rutnessur authority to execute the deed on his behalf, our decision must be without prejudice to his rights, and he is entitled to his costs in this Court.

The decision of the Judge as far as Hurrosoonduree is concerned, is reversed, and the Special Appeal decreed with costs payable by her.

THE 10TH MARCH 1873.

*Present :*

The Hon'ble F. A. GLOVER, and } *Judges.*  
" " DWARKANATH MITTER, }

*Special Appeals from a Decision passed by the Officiating Judge of Hooghly, dated the 17th January 1872, affirming a decree of the Moonsiff of Chowkey Horipal, dated the 9th September 1871.*

CASE No. 580 OF 1872.

Soudaminee Dabea, ... (*Plff.,*) *Appellant,*  
*versus*

Mohesh Chunder Mookhopadhyaya, one of the ... } (*Defts.,*) *Respondent.*

CASE No. 581 OF 1872.

Sreemutty Soudaminee Dabea, } (*Plff.,*)  
*Appellant,*

*versus*

Eshan Chunder Hazra, and } *Defendants,*  
others ... } *Respondents.*

*For Appellants.*—Baboo Hemchunder Banerjee and Bamachurn Banerjee.

*For Respondents.*—Baboo Becharam Mookherjee.

Held by Glover J. in accordance with F. B. K. reported 10 W. R., P. 10 that a suit for a koboleut must be dismissed where the plaintiff fails to prove the rate of rent claimed.

Held by Mitter J. that in respect of resumed lakheraj lands, where the lakherajdar does not choose to accept the terms offered by the zemindar, there is no relationship of landlord and tenant between the parties, consequently a suit for a koboleut must fail.

*Mr. Justice Glover.*—I think that these appeals must be governed by the Full Bench decision in *Ghulam Mahomed versus Asmat Alee Khan*, X. W. R., p. 10.

The suit was for a kubooleut for certain resumed Lakheraj lands at the rent of Rs. 79-12, and both Courts below found that the quantity of land in the defendant's possession was less than that alleged by the plaintiff, and that the rates of rent as deposed to by the witnesses were less than that claimed; they, therefore, on the authority of the decision above quoted, dismissed the plaintiff's suit.

It is urged in appeal that the two cases are not similar, and that the plaintiff, who only claimed a rate of rent which would probably be found to be the correct rent, is not in the position of a landlord claiming a fixed rate of rent certain and ought to have been awarded a kubooleut at such rates as might be found just and proper.

But the plaintiff did, in my opinion, substantially claim a certain rate of rent. He does certainly use a word which may be translated "probable," but the entire gist of his suit is to get a certain rate which he fixes as the rate, which other ryots similarly circumstanced were in the habit of paying, and the mere use of the word "probable" ought not under the circumstances to better his position. As landlord with his jumma-bundee at hand to consult, he could have had no possible difficulty in making an exact estimate, and I have no doubt that he meant the rate claimed to be that estimate.

The case of *Gopee Nath Jana versus Jeetu Mallah and others*, XVIII, W. R., p. 272, is not in point. In that case, the defendant had had notice of the zemindar's claim, and knew perfectly well the case he had to meet, and as a matter-of-fact did his best to meet it. In this case, no notice was served.

I do not think that we can say that the Judge was wrong in law in deciding as he did, and as the question whether under the circumstances of this case a suit for a kubooleut would lie at all) and concerning which there have been conflicting decisions of this Court,) was not raised before him, there appears to be no necessity for our considering it in this appeal.

I would dismiss these appeals with costs.

*Mr. Justice Mitter.*—I concur with my learned colleague in dismissing these two Special Appeals with costs.

The mere fact that the lands in question were declared, in a previous litigation between the parties, to be the *mal* lands of the plaintiff's zemindary, wrongfully held by the defendant under an invalid *Lakheraj* title, created subsequent to the 1st of December 1790, is not, in my opinion, sufficient to convert the defendant into a tenant of the plaintiff, in respect of those lands. In the case of an invalid *Lakheraj* grant for less than one hundred beeghas made before the date above referred to, the relationship of landlord and tenant does not, and cannot, come into existence between the Lakherajdar and zemindar, until the former has agreed to accept the assessment made by the Collector under the provisions of the 9th section of Regulation 19 of 1793; and I do not see any reason whatever why a different principle should be adopted in cases falling within the 10th section of that Regulation. It may be conceded that, under this latter section, the zemindar is entitled, nay, required to annex the lands to his zemindary and to collect the rents thereof; but so long as the Lakherajdar does not choose to accept the terms offered to him, all that the zemindar can do is to sue him for ejectment or for use and occupation or for both. The decrees relied upon by the plaintiff, merely declared that the lands in dispute are the *mal*-lands of his estate, and that the defendant had taken wrongful possession thereof under color of a *lakheraj* title. How such a declaration can be construed to have the effect of converting a trespasser, pure and simple, like the defendant, into a tenant of the plaintiff, I am utterly at a loss to understand; nor am I aware of any principle or rule of law on the strength of which it can be held that a person, who holds wrongful possession of another's land, and who has never agreed in any manner whatever to accept the position of a tenant, is liable to be treated as such against his will and consent. I am fully prepared to admit that the relationship of landlord and tenant can be created by express statutory provision as well as by contract based upon mutual consent. But I find nothing whatever either in the 10th section of Regulation 19 of 1793 or in the decrees relied upon by the plaintiff, which goes, to establish such a relationship between him and the defendant, and in the absence of any mutual agreement, express or implied, between the parties, I feel myself

bound to hold that the defendant cannot be treated against his will as a tenant of the plaintiff in respect of the lands to which his litigation relates.

If the preceding observation be correct, as far as they go, the present suits which are brought for kubooleuts must fail as a matter of course. It has been repeatedly held that the very foundation of a suit for kubooleut is the existence of the relationship of landlord and tenant, and as that foundation is wanting in both the suits now before us, we are bound to dismiss them both with costs.

THE 11TH MARCH 1873.

*Present:*

The Hon'ble DWARKA NATH MITTER,  
,, ,, W. AINSLIE, ... .. Judges.

*Regular Appeals from a Decision passed by the Deputy Commissioner of Lohurdugga, dated the 26th July 1871.*

CASE NO. 229 OF 1871.

Thakoor Jeet Nath Sahee } (*Defendant,*)  
Deo ... .. } *Appellant,*  
*versus*

Lal Lokenath Sahee Deo ... } (*Plaintiff,*)  
} *Respondent.*

CASE NO. 230 OF 1871.

Thakoor Jeet Nath Sahee Deo } (*Plaintiffs,*)  
and others ... .. } *Respondents.*

*For Appellants.*—Messrs. J. T. Woodroffe  
and R. E. Twidale.

*For Respondents.*—Mr. C. Gregory.

Where a party relies on a special custom it is for him to prove such special custom.

Where a party bases his claim upon a special custom, he cannot be allowed in appeal to fall back upon the ordinary Hindoo Law of inheritance.

BULBUDDER SAHEE.

Drip Nath Sahee.

Domun Sahee.

Dookhun Sahee Deonath Sahee, widow  
Lalun Shamkoer whose  
estate is in dispute.

Shib Nath Sahee.

Jugger Nath Sahee.

Jeet Nath Sahee, defendant.

Mudsodun Sahee.

Triloke Nath Sahee  
issueless.

Kopeel Nath Sahee,  
issueless.

Loke Nath Sahee,  
plaintiff.

Jonardun Sahee,

Joy Nath Sahee.

Luchmee Nath Sahee.

Ajoy Nath Sahee.

Gopee Nath Sahee.

*Mr. Justice Mitter (Ainslie, J., concurring).—*  
The parties to this suit are members of a junior branch of the family of the Moharajah of Chotanagpore, and the relation in which they stand to each other may be seen from

the short geneological tree given at the head of this judgment.

The plaintiff brought this action, as the representative of his father Jonardun Sahee, to recover possession of a fourth share of the moveable and immoveable properties mentioned in the schedule attached to his plaint. These properties, it is admitted on both sides, originally formed part of an estate which was granted to one Thakoor Aynee Sahee, for his maintenance, by one of the former Moharajahs of Chotanagpore, the said Thakoor Aynee Sahee being one of the junior members of the family of the grantor. On the death of Thakoor Aynee Sahee, the eldest of his surviving sons succeeded to the Thakooree Guddee as well as to the bulk of the estate above referred to, and one of his younger sons Thakoor Bulbhudder Sahee, the admitted common ancestor of the parties obtained a portion of that estate for his maintenance. The properties now in dispute formed part of the share thus obtained by Thakoor Bulbhudder Sahee, and the person last seized of them was Lalun Sham Koer who held the same as the representative of her husband Deo Nath Sahee, deceased, down to the date of her death which took place on the 12th of Jeyt 1927 S. E.

The case of the plaintiff as set forth in his plaint was that Deonath Sahee having died without issue, all the properties in question ought, "according to the Hindoo Shasters and the custom of the family," to be divided equally between all the surviving male descendants of the common ancestor, Thakoor Bulbhudder Sahee, and as there are four such descendants, namely, the plaintiff's father, Jonardun Sahee, the defendant Jeetnath Sahee, and the two plaintiffs in Regular Appeal No. 230 of 1871 whose names are Joynath Sahee and Luchmee Nath Sahee, the plaintiff, as the representative of his father Jonardun Sahee, laid claim to a fourth share of those properties.

The answer of the defendant Jeetnath Sahee was to the effect that according to the long established custom of the family of Thakoor Bulbhudder Sahee he, the said defendant, as the representative of the eldest branch thereof, is entitled, solely and exclusively, to the properties in dispute, and that Lochun Sham Koer had, a short time before her death, made a verbal gift of all the

moveable properties in her possession in his favor.

In this state of the pleadings the Deputy Commissioner of Lohurdugga who tried this case in the first instance laid down the following issues, namely :

1st. "Whether according to the family custom the plaintiff is entitled to a fourth share of the property in dispute, or the defendant to the whole in consequence of his being descended from an elder branch of the family."

2ndly. "Whether the deceased Lalun Shamkoer made a gift of her personal property to the defendant, and, if so, whether such gift is valid."

3rdly. What is the annual income of the estate and the value of the personal properties, &c., taken possession of by the defendant."

The learned Deputy Commissioner found the first and second issues in favor of the plaintiff and accordingly gave him a decree leaving the third issue to be determined in execution. Hence the present appeal by the defendant.

We are of opinion that the decision of the learned Deputy Commissioner is erroneous and ought therefore to be set aside.

We think there can be no doubt whatever that the burden of proving the affirmative of the first part of the first issue lies upon the plaintiff, and we are by no means prepared to say that he has succeeded in discharging that burden. The learned Deputy Commissioner seems to have thought that the previous decisions of the Civil Court, bearing date the 7th of March 1815, and the 3rd of May 1834, respectively, are sufficient to make out a strong *prima facie* case in the plaintiff's favor, and he has accordingly thrown the whole burden of proof on the defendant. But in this opinion we are wholly unable to concur. The only point which was determined by the decisions above referred to was that on the death of any member of Thakoor Bulbhudder Sahee's family all the sons of the deceased are entitled to obtain equal shares of the estate left by him. But there is a wide gulf between that point and the point upon which the plaintiff has thought fit to rest his claim in the present case. That claim, it should be borne in mind, is not based upon the ordinary Hindoo Law of inheritance. The plaintiff does not say that Jonardun Sahee, Jeet Nath Sahee, Joy Nath Sahee and

Luchmee Nath Sahee are entitled to participate equally in the estate of Deonath Sahee because they are his heirs under that law. Indeed such a statement would have been manifestly untenable, it being beyond all question that the said individuals cannot, under any circumstances, be considered as related to Deonath Sahee as sapindas of equal degree and therefore entitled to take as coheirs. But the plaintiff relies upon a special custom by virtue of which he says, all the surviving male descendants of the common ancestor Thakoor Bulbhudder Sahee are entitled to obtain equal shares of the properties left by a childless member of the said Thakoor's family without any reference whatever to their position in the family tree or to their capability to satisfy the conditions of heirship laid down by the ordinary Hindoo Shasters. Such a custom is, on the face of it, quite different from that established by the decisions relied upon by the learned Deputy Commissioner, and we are therefore unable to see how those decisions can help the plaintiff in the smallest degree, either directly or indirectly.

If, therefore, we leave aside the two decisions above referred to, the only other evidence produced by the plaintiff of which we need take any notice in our judgment is the testimony given by his witnesses. We are of opinion, however, that this testimony is entitled to no weight whatever, and we feel little hesitation in making this remark, not only because the learned Deputy Commissioner who examined those witnesses and who had therefore the best opportunity of judging of their credibility, does not seem to have placed any reliance upon their evidence, but also because the insufficiency of that evidence was virtually conceded before us by the pleader who argued this case on behalf of the plaintiff. It is true that the said witnesses all start with the assertion that Jonardun Sahee, Jeet Nath Sahee, Joy Nath Sahee and Luchmeenath Sahee are the four persons who are entitled to succeed to the estate left by Deonath Sahee deceased, but we think that they have completely failed to furnish us with any reliable materials on the strength of which that assertion can be deemed sufficient to prove the custom relied upon by the plaintiff. The first witness Sreenath Sahee mentions only one instance in support of the said custom. He says first of all, "it is a custom in vogue in the family of both parties that the

"brothers become entitled to equal shares. "The eldest son does not receive the whole "property." This statement is, as we have already observed, by no means sufficient to prove the plaintiff's case. He, the witness, then goes on to say, "Sham Soonder Sahee "had (3) sons, Monee Sahee, Hem Sahee, "Lochun Sahee and Dheanee Sahee were "his sons. Lochun Sahee died leaving no "issue; whereupon his three surviving "brothers, viz, Muneo Sahee, Lochun Sahee "and Dheanee Sahee received his property." This statement seems to be inconsistent on the very face of it, and it is scarcely necessary to observe that it would not advance the plaintiff's case in the least even if we accept it as true. The second witness, Lal Moheep Narain says, "It is a custom in "vogue in the family that if one of four bro- "thers die without issue, the three surviving "brothers divide the share left by him "equally among themselves and not give the "whole to the eldest brother." It is clear that the present case is not one between brothers, and it is therefore beyond all question that the above statement is wholly beside the question upon which the plaintiff's case depends. The witness then goes on to state that he is a stranger to the family and mentions the case of one Anund Sahee who is admittedly an illegitimate member of the family.

The third witness, Podum Lochun Sahee, is no doubt a member of the family; but his evidence is not a whit better than that of the two preceding witnesses. After stating that the plaintiff is entitled to a fourth share of the estate left by Deo Nath Sahee, this witness goes on to say, "Sham Soonder "Sahee was the brother of Bulbhudder Sahee. "Shamsoonder Sahee had three sons, to wit, "Nuthoo Sahee, Kaloo Sahee, and another "whose name I do not know. The heirs of "Nuthoo Sahee are Bhoop Nath Sahee and "Inder Nath Sahee, &c., &c., The pro- "perty left by the son having no issue was "equally divided by the heirs of Nuthoo "Sahee." Now it is admitted on both sides that neither Nuthoo Sahee nor Kaloo Sahee was the son of Sham Soonder Sahee, and it is therefore perfectly clear that the whole of the above statement made by the witnesses must fall to the ground. On cross-examination the witness was obliged to admit that with the exception of the case of Nuthoo Sahee and Kaloo Sahee, "there was no one dying without issue to his knowledge."

The fourth witness Deo Nath Sahee says, "Perhaps Sham Soonder Sahee had four sons, of whom two were blessed with children, and two left no offspring, when two of them died leaving no male issue, the surviving two divided their property between themselves," and he adds towards the end of his deposition, "if one of our brothers die without leaving any offspring, his surviving brothers get his property equally divided. *I have never seen such a case.*" It is manifest that statements of this description are too worthless to require any comments.

The fifth and last witness whose testimony has any bearing on the point under our consideration is Rughoobur Sahee. He says, "Sham Soonder Sahee had four sons; two of them Nuthoo Sahee and Hem Sahee have left their children and the other two have died without issue. Nuthoo Sahee and Kaloo Sahee took their property, they lived in commensality." It is scarcely necessary for us to repeat that these statements are incorrect, for it is admitted that Nuthoo Sahee was not the son of Sham Soonder Sahee.

The above is all the evidence which the plaintiff has produced to prove the custom upon which he has thought fit to rest his case. The defendant has, on the other hand, produced several witnesses in support of the custom relied upon by him, and we are bound to say that those witnesses have clearly proved that in two instances at least, the said custom was followed in Thakoor Bulbhuder Sahee's family. Whether the evidence given by the said witnesses would have been deemed sufficient, if the burden of proof had been primarily upon the defendant, is a question, which we need not pause to determine. But it seems to us perfectly clear that it is, at any rate, quite strong enough to rebut the case attempted to be made out by the witnesses produced by the plaintiff.

There is another point in the defendant's case with reference to which we wish to make a few remarks. It seems to be admitted on both sides that according to the custom prevalent in the eldest branch of Thakoor Aynce Sahee's family, the property left by a childless member devolves on the eldest, or in other words, on the member who is in possession of the Guddee, and who is therefore called the "Guddee Thakoor." Now the position, occupied by the defendant in Thakoor Bulbhudder Sahee's branch of

family, appears to be precisely similar to that occupied by the Guddee Thakoor in his own branch, it being admitted on both sides that he, the defendant, is a Thakoor and that the junior members of his branch of the family pay the rents due from them on account of the shares in their possession through him. Under such circumstances the defendant has every right to contend that the two branches above referred to, being descended from the same stock, the same custom must be presumed to obtain in both of them until the contrary is proved by the clearest and most satisfactory evidence. The learned Deputy Commissioner in dealing with this argument observes as follows:—

"The defendant further places great reliance on the decision of the 23rd February 1815, exhibit No. 3 for the plaintiff, in that it was ruled in that case that Rughoobur Nath Sahee who was the head of Juggurnath Sahee's family, that is the eldest branch, was entitled to succeed to the property of another junior member of his family who had died without issue, thus showing this to be the family custom. This no doubt was held to be the custom in the family of Juggurnath Sahee, but the plaintiff's contention is that the same custom is not prevalent in Bulbhudder Sahee's family, and it certainly does not seem to me to follow as a matter of course that, because a custom prevails in Juggurnath's family, that is, the Thakoor's family, it should therefore prevail in Bulbhudder's family. On the contrary, it has been shewn before that one custom at any rate, viz., the one of the direct heirs of the eldest branch holding a larger share than those of the younger branches and succeeding to the title of Thakoor is not applicable to Bulbhudder's family, and it seems to me, in the absence of all reliable evidence more reasonable to argue that the other custom also is not applicable than that it is." But we do not think that this is a fair way of putting the argument. The presumption rather is that both the branches being offshoots of the same family, are governed by the same custom until the contrary is proved, and it does not follow that because they differ in respect of one particular custom, they must necessarily differ in respect of every other.

It has been argued that the plaintiff is, at any rate, entitled to take his stand upon the ordinary Hindoo Law of inheritance inas-

much as his father Jonardun Sahee appears to be the nearest sapinda of Deonath Sahee. We are of opinion that this was not the case which the plaintiff attempted to make out in the Court below, and we cannot therefore allow him to fall back upon it at this late stage of the proceedings. It is true that there are some passages in his plaint in which reference is made to "the Hindoo Law" and "the Hindoo Shashsters;" but the whole context of that document leaves no reasonable doubt in our mind that those passages were introduced in it merely for the purpose of giving additional force and validity to the special custom upon which he based his suit, it being a doctrine both of that law and of those Shashsters, that "immoveable custom is transcendent law." Were it otherwise, we cannot understand why the plaintiff contented himself with claiming only a fourth share of the properties in dispute, or why it was that he acknowledged the right of Jeetnath Sahee, of Joynath Sahee and of Luchmeenath Sahee, to participate in those properties, when it is perfectly clear that no such right could possibly be claimed by those individuals under the ordinary Hindoo Law of inheritance. Indeed the very passages in which the plaintiff appeals to the Hindoo Shashsters in support of his father's right to succeed to a fourth share of the properties in question also affirm the right of Jeetnath Sahee, of Joynath Sahee and of Luchmeenath Sahee to obtain equal shares in those properties, and this fact alone is sufficient to show beyond all reasonable doubt that in invoking the said Shashsters, the plaintiff had no intention whatever to rely upon the ordinary rules of succession laid down therein.

Then again the issues upon which the plaintiff went to trial in the Lower Court have no reference whatever to the said rules, nor is there a particle of evidence on the record to shew that his father, Jonardun Sahee, is the nearest heir of Deonath Sahee. Suppose, for instance, that there is a daughter's son of Deonath Sahee living. It is clear that in such a case Jonardun Sahee would not have the slightest pretence for saying that he is entitled to claim any part of the disputed properties under the ordinary Hindoo Law of inheritance, and this circumstance alone is sufficient to shew the danger of allowing the plaintiff to set up a new case which was never put forward by him in the Court below.

Lastly, we wish to observe that the very nature of the properties in dispute is sufficient to raise a strong presumption against the theory of their being governed by the ordinary rules of succession laid down by the Hindoo Law. Those properties, it should be borne in mind, were held by Deonath Sahee under a grant for maintenance, and it would be *prima facie* inconsistent with the nature of such a grant to hold that they are subject to such rules, for they might, on such hypothesis, devolve upon such relatives as maternal uncle's maternal sons, &c., and thus be lost to the family for whose support they were originally intended. It seems to be admitted on both sides that the representative of the oldest branch of Thakoor Ayneo Sahee's family, or in other words the Guddee Thakoor would have been entitled to resume the disputed properties, if there were no male descendants of Thakoor Bulbludder Sahee living, and this admission coupled with the fact that both parties were agreed in the Court below in resting their respective cases not upon the ordinary Hindoo Law of Inheritance but upon custom, shows beyond all doubt that it would be highly improper to allow the plaintiff to fall back upon that law at this late stage of the proceedings.

Holding this view of the case, we do not think it necessary to express any opinion on the second and third issues, and we accordingly reverse the decision of the Deputy Commissioner, and dismiss the plaintiff's suit with costs both in this Court and in the Lower Court.

It being admitted on both sides that this appeal is governed by our decision in Regular Appeal No. 229 of 1871, it is not necessary for us to record a separate judgment. We wish merely to remark that in this case at least the plaintiffs respondents have no right whatever to appeal to the ordinary Hindoo Law of Inheritance in support of their claim.

Let a decree be, therefore, drawn up in this case, similar to that passed in Regular Appeal No. 229 of 1871.



THE 11TH MARCH 1873.

*Present :*

The Hon'ble W. MARKBY and } Judges.  
 „ „ E. G. BIRCH ... }

CASE No. 971 OF 1872.

*Special Appeal from a Decision passed by the Subordinate Judge of Hooghly, dated the 29th April 1872, reversing the decree of the Moonsiff of Serampore, dated the 31st January 1872.*

Kalee Krishto Roychow- } Plaintiff,  
 dhry, ... } Appellant,

*versus*

Haran Chunder Dey and } Defendants,  
 Nittya Gopal Dey ... } Respondents.

*For Appellant.*—Baboo Chunder Nauth Bosc.

*For Respondent.*—Baboo Umbica Churn Banerjee

A suit for account and for plaintiffs' share of the profits after dissolution of a partnership, in which by agreement the Defendants who were working partners undertook with the Plaintiff who supplied the capital, that they would be liable for any outstandings in respect of goods sold on credit; is governed by the limitation prescribed by Clause 16 Sec. 1 Act XIV. of 1859. The decision of the Privy Council reported 16 W. R. p. 35, Privy Council Rulings distinguished.

*Mr. Justice Markby.*—It appears that this was a suit in which there were three questions to be decided between the parties.

The suit was for an account of what the plaintiff alleged to be a partnership, and he annexed to his plaint a statement of the mode in which he said the account ought to be made up; and the three questions to be decided were; 1st, whether the relationship between the parties was that of partners, or as the defendant alleged that of master and servant. The second point to be decided was whether the whole suit was barred by limitation; and the third point to be decided was whether any of the particular items in the accounts was barred.

The Moonsiff decided that the relationship between the parties was that of partners; that the suit was not barred by limitation, and then he made up the account between the parties giving the plaintiff something less than what he claimed.

Both the parties appealed, and the Subordinate Judge has given a judgment in this case which we find extremely difficult to understand. He does not seem to consider that the whole suit is barred by limitation, and he expresses no opinion whatever as to

whether or not he agrees with the Moonsiff in his finding that the relationship between the parties was that of partners. But because he considers that one item of the accounts was barred by the law of limitation, he sets aside the whole decree of the Moonsiff, and remands the whole case to him to be retried. Now even supposing that the Subordinate Judge was right in finding that this item in the accounts was barred, still he would be wrong in remanding the case. The only result of that finding would have been that he could have struck that item out of the account; and then, if he concurred with the Moonsiff as to the relationship of partners existing between the parties, he could have given a decree accordingly.

The case now coming up here in special appeal it is contended that the decision of the Subordinate Judge on this item of the accounts was wrong. On the other hand, by way of cross-appeal, it is contended by the respondent that the whole suit was barred. Therefore the whole question raised in the first Court is now before us.

As regards the question whether the whole suit is barred (which is perhaps one of ninety) we shall follow the decision of this Court, reported in the 7th Weekly Reporter, page 36, where it was held that a suit for an account, and for the plaintiff's share of the profits after an admitted dissolution of partnership, is governed by the limitation prescribed by clause 16, section 1 of Act XIV of 1859, which gives six years from the date of dissolution. As to the application of the law of limitation to the item in question, the facts stand thus:—There was a clause in the agreement by which the defendants, who were the working partners, undertook with the plaintiff who supplied the capital to carry on a business on the understanding that they would be liable for any outstandings in respect of goods sold on credit. And the Subordinate Judge, upon a decision of Her Majesty in Council, reported in Volume 16, of the Weekly Reporter, page 35, Privy Council Rulings, has held that this item is barred, because (as he puts it) the defendants by selling goods on credit had violated the terms of their contract, and that therefore so far as this item is concerned, this is a claim for a breach of contract, and therefore barred by clause 9, section 1 of Act XIV of 1859. I think that this is not a right view of the case. I do not think that this can be treated as a suit for breach of

contract. I think that all that the parties intended was that when the accounts should be made up, in respect of all goods sold on credit, it should be taken as if the defendants had received payment in full—and upon that view of the transactions, it does not appear to me that there was any cause of action which could cause the statute of limitation to run during the currency of the partnership. It seems to me that there was no cause of action at all until the dissolution of partnership, and then there was but one cause of action, namely, for an account of the profits of the partnership received by the defendant. The case to which the Subordinate Judge has referred us is one of a totally different character. That was not in the nature of a suit for accounts, but a suit by a principal against his del credere agent for the recovery of a specified sum of money due on a balance of account. The agreement between the parties in this case merely contains a clause directing the mode in which the accounts between the partners were to be made up, and I think clause 9 of section 1 of Act XIV of 1859, is not applicable, and therefore the whole case falls within the decision in the 7th Weekly Reporter referred to above.

The result is that we must remand the case to the Subordinate Judge to do that which he ought to have done before; namely, to determine whether or not he agrees with the Moonsiff in thinking that the relationship of partners exists between the parties.

We may also remark that even if the Subordinate Judge thought it necessary to remand this case, it was his duty to have remanded it, not upon any such general observations as he has made, but by a clear and express order either laying down the issue or issues to be determined; or pointing out the erroneous procedure of the first Court in coming to its decision. In point of fact however, the decision of the Moonsiff as regards the law is right, and that of the Subordinate Judge is wrong.

THE 13TH MARCH 1873.

Present :

The Hon'ble W. MARKBY and  
" " E. G. BIRCH } Judges.

CASE NO. 980 OF 1872.

*Special Appeal from a Decision passed by the Judge of West Burdwan, dated the 18th April 1872, reversing a decree of the Moonsiff of Radhanuggur, dated the 6th June 1871.*

Soodharam Bhuttacharjee,  
the Sebnat of Sree Sree  
Kally Thakooranee, one of  
the (Defendants)... } Appellants,

versus

Obhoy Chunder Bundopadhya }  
and others (Plaintiffs) ... } Respondents.

*For Appellants.*—Baboo Umbica Chunder  
Bannerjee.

*For Respondent.*—Baboo Nilmadhub Sein.

Under Section 50 Act XX of 1866 a registered deed of sale must prevail over an unregistered mortgage deed the mortgagee however being entitled to a money decree against the Mortgagor.

*Mr Justice Markby, (Birch, J., concurring.)*  
—The plaintiff in this case sues upon an unregistered bond in which the defendant Kristodhone had pledged as security for a loan a tank called Radha Sair. The bond purports to have been executed on the 9th Jaisto 1266. The defendant did not appear though duly summoned, but Soodharam Bhuttacharjee appeared and asked to be made a party to the suit, alleging that he was in possession of the tank by virtue of a deed of sale executed by Krishtodhone Bose on the 4th Srabun 1274, and duly registered.

The first Court found that the plaintiff's bond was a forged document, and for that reason dismissed the suit without going into the question of the validity of the deed of sale propounded by Shoodharam.

On appeal the Judge held that the bond was genuine; he also held that the deed of sale was a well-attested deed, and that the bond did not interfere with it. He was of opinion that Shoodharam must be considered to have bought the tank encumbered with the mortgage; and that the registered deed of sale could not prevail over the unregistered mortgage bond. His order is not clear, but the only interpretation to be put upon is

that he gave the plaintiff a decree for the sum due confirming his right as mortgagee of the tank.

Soodharam appeals, and it is urged on his behalf that the Judge is wrong in holding that the registered deed of sale does not prevail over the unregistered deed of mortgage. There can be no doubt that immediately after his purchase Soodharam obtained possession of the tank. The plaintiff raised no objection to the change of possession. He comes into Court upon an unregistered bond nearly 12 years after its execution. He is met by an allegation of possession under a registered deed of sale by his mortgagor to Soodharam. We think that there can be no doubt that the registered deed of sale must prevail over the unregistered mortgage deed. The question is governed by Section 50 of Act XX of 1866. That Section provides that "every instrument of the kinds mentioned in clauses 1, 2 and 3 of Section 18, shall, if duly registered, take effect as regards property comprised therein against every unregistered instrument relating to the same property whether such other instrument be of the same nature as the registered instrument or not;" and if it applies, then the plaintiff's mortgage bond being unregistered cannot prevail against the defendant Soodharam's purchase deed which, though of later date, was duly registered. It seems to us to be a reasonable construction of the Act that it does apply to such a case. It is contended that it does not, because the mortgage bond was executed before the Act came into operation. But the provisions of this Section are not new. The principle of them is contained in the previous Acts XIX of 1843, Section 2 and XVI of 1864, Section 68. If these provisions of the Registration Act did not apply to instruments previously executed, the law of registration would be full of anomalies, and titles which were once secure would become insecure when a new Registration Act was passed. Had it been intended that these provisions should not be so far retrospective, the successive Acts when repealed would have been kept in force in this respect as to documents already executed. When Act XIX of 1843 was passed, express provision was made that these provisions should not apply to documents executed before a certain date. No such provision is contained in the subsequent Acts. But the explanation of Section 50

in the present Act (VIII of 1871) clearly assumes that the Act applies to deeds already in existence.

The respondent has relied on the decision reported in X Weekly Reporter, page 65; but that case is, we think, distinguishable. Mr. Justice Macpherson there says distinctly, that, "if it were mere question which deed was to be given effect to, the plaintiff, (who had purchased under a prior unregistered bill of sale,) is not entitled to recover," *i. e.* to recover as against the defendant who had purchased under a subsequent bill of sale which had been duly registered. But the learned Judge goes on to show that the first purchaser had been eleven years in possession, and that therefore his position was "far stronger than if he were seeking possession for the first time under his deed of sale: and the question is not merely one as to the effect to be given to a deed as against a deed of later date;" and Mr. Justice Bayley also relies on the fact that the unregistered purchaser had obtained possession. The principle that runs through this and a number of other similar cases seems to be this, that non-registration will not impair the validity of a deed executed in good faith under the old law in force at the time of execution under which registration was optional, if possession has actually been acquired and enjoyed before the execution of the second deed.

In the case before us the mortgagee never had possession. The mortgagor sold the property to the defendant, and the deed of sale was duly registered and possession was acquired by the defendant. Under such circumstances the registered deed of sale must prevail over the unregistered mortgage, and the plaintiff can only obtain a decree for money lent against Krishodhone Bose.

We observe the Judge has said that the grounds of Moonsiff's judgment are mere conjecture, and that his reasons are frivolous. We are wholly unable to concur in that observation. We think that they were worthy of the Judge's most careful consideration.

No decree has been drawn up by the Judge in this case except that the "appeal is decreed;" a decree which it would have been impossible for the plaintiff to execute. As however the judgment is wrong in point of law, we set aside the decree of the Lower Appellate Court, and direct that the plaintiff do have a personal decree against the defend-

ant Kristodhone for the sum of Rupees 99-1-8 with interest at 5 per cent. from this date until payment; and that the suit so far as it seeks to render the property purchased by the defendant Soodharam liable under the mortgage bond executed by Kristodhone in the year 1266 B. S. be dismissed, and that the plaintiff do pay to the defendant Soodharam his costs in this the Court and the Courts below.

THE 13TH MARCH 1873.

*Present :*

The Hon. LOUIS S. JACKSON and } *Judges.*  
 „ DWARKA NATH MITTER, }

CASE NO. 1198 OF 1870.

*Special Appeal from a decision passed by the Subordinate Judge of 24-Pergunnahs, dated the 28th March 1870, reversing a decree of the Sudder Moonsiff of Alipore, dated the 1st September 1869.*

Jodo Nath Sircar, plaintiff, ..... *Appellant,*  
*versus*

Bosunt Coomar Roy Chowdhry, defendant ... *Respondent.*

*For Appellant.*—Baboos Gopal Lall Mitter and Grish Chunder Ghose.

*For Respondent.*—Mr. J. T. Woodroffe, Baboos Rajendro Nath Bose and Oopendro Chunder Bose.

A property, received by a Hindu lady from her father by a Will, falls within that category of *Stridhuni* which is described in the Hindu Shasters as property given to a woman by her father before her marriage. When a Hindu lady dies possessed of such property, leaving her surviving her mother and her husband, the mother is the preferential heir.

*Mr. Justice Mitter ( Jackson, J., concurring.)*—The property which forms the subject matter of this litigation originally belonged to one Hurry Narain Mitter, who gave it by will to his daughter Prosunmoyee. Soon after the death of her father, Prosunmoyee married Janokee Nath Sircar, the plaintiff in this case, and died shortly after leaving her husband, and her mother surviving her. In this state of facts, the question we have to determine is whether the mother or the husband is entitled to inherit the property above described.

Before proceeding, however, to determine this question, we think it necessary to make

a few preliminary observations on the legal character of the property in dispute. It has been argued on behalf of the respondent that this property cannot be held as the *Stridhuni* of Prosunmoyee, inasmuch as it was acquired by her, not under an ordinary gift, but under a testamentary devise,—a mode of disposing of property not recognized by the ancient law of the Hindoo. We are of opinion, however, that this objection is not valid. Whatever might have been the ancient Hindoo law on the subject, it seems to have been settled by a uniform course of decisions of unimpeachable authority that testamentary dispositions are not opposed to the spirit of that law, and we may add that in the recent case of Tagore *versus* Tagore, it has been expressly held by the Privy Council that such dispositions are to be treated as a species of gift. “As to gifts by way of wills,” their Lordships observe, page 366, Weekly Reporter, Vol. 18, “whatever doubts may have once been entertained by learned persons as to the existence of the testamentary power, those doubts have been dispelled by a course of practice in itself enough, if necessary, to establish an approved usage and by a series of judicial decisions both here and in India proceeding upon the assumption that gifts by wills are legally binding, and recognizing that form of gift as part and parcel of the general law. The introduction of gift by will into general use has followed in India as in other countries the conveyance of property *inter vivos*. Such a disposition of property to take effect upon the death of the donor though revocable during his lifetime is until revocation a *continuous act of gift* up to the moment of death, and does then operate to give the property disposed of to the persons designated as beneficiaries. They take upon the death of the testator as they would if the property had been given to them during his life-time, &c., &c. The law of wills has, however, grown up from a law which furnishes no analogy but that of gifts, and it is the duty of tribunals dealing with a case new in the instance to be governed by the established principles, and the analogies which have prevailed in like cases.” The above observations are, we think, sufficient to justify us in holding that the property in dispute falls within that category of *Stridhuni* which is described in the Hindoo Shasters as property given to a woman by her father before her marriage ;

and we accordingly overrule the preliminary objection of the special respondent.

With reference to the main question itself, we are of opinion that the mother, and not the husband, is the preferential heir.

It is admitted on both sides that the case before us is governed by the Hindoo law current in the Bengal school, and as the Daya Bhaga is the highest of all the authorities recognized in that school, it is to the Daya Bhaga that we will first direct our attention.

Now, Clause 29, Section 3, Chapter IV. of that treatise (Colebrooke's translation, page 95) appears to us to be conclusive on the point. That clause is as follows:—

"Therefore the property goes first to the whole brothers; if there be none to the mother; if she be dead to the father; but on failure of all these it devolves on the husband. Thus Catayana says, 'That which has been given to her by her kindred goes on failure of kindred to her husband.'"

It has been argued that the passage above quoted, refers to that kind of *stridhūn* only, which is called *Sulka* (fee or perquisite.) But this argument is evidently founded on a mistake. The very text of Catyana cited by the author in the passage in question shows that it also refers to property given to a woman by her kindred, that is to say, by her father and mother; and if this is not sufficient to remove all doubts on the point we have only to examine a few of the preceding Clauses.

In Clause 10 of the same Section and Chapter, the author introduces the subject by saying that "property received by a woman after her marriage from the family of her father, of her mother or of her husband goes to her brothers" ("not to her husband"), and in support of this position he cites a text of Yagnavalkya which declares, "That which has been given to her by her kindred as well as her fee or gratuity (*sulka*) and any thing bestowed after marriage her kinsmen take, if she die without issue." It should be borne in mind that this text of Yagnavalkya refers to three different kinds of *stridhūn*; namely, 1st, property given to a woman by her kindred; 2nd, her (*sulka*) fee or gratuity, and 3rd, property bestowed on her after her marriage.

In the next Clause (Clause 11), the author takes up the first of these three kinds of *stridhūn*, and says that "property given by her kindred," means property given by her

father or mother. He then adds that brothers are signified by the word "*kinsmen*."

In Clause 12, he cites a text of Vriddha Catyana declaring that, "immovable property given to a woman by her parents goes always to her brothers if she die without issue," and adds that "the brother's right of succession is founded on her leaving no issue."

In Clauses 13, he says, that according to the opinion of Viswarupa, the brother is entitled to inherit such property without any reference whatever to the particular form of marriage, and adds that this opinion ought to be respected.

In Clause 14, he says, that the above rule is *a fortiori*, applicable to every other kind of property.

In Clause 15, he says, that the phrase "given by her kindred," signifies that which was given to her by her parents *during her maiden state*.

In Clauses 16, 17 and 18, he defines, "a gift subsequent," which is the third kind of *Stridhūn* mentioned in the text of Yagnavalkya above referred to.

In Clause 19 he takes up the second kind of *Stridhūn* mentioned in that text, namely, *Sulka* property.

In Clauses 20 and 21 he explains what *Sulka* means.

In Clauses 22, 23, 24, 25, 26 and 27 he discusses the opinions of several authors about the order of succession to be followed in regard to such property, and in verse 28 he concludes the discussion by saying that, "in the first place it goes to brothers of the whole blood, then to the mother and on her default to the father."

It is clear therefore that the proposition laid down in Clause 29, is nothing but the final resume of the various matters discussed in the preceding Clauses, commencing from Clause 10; and its applicability to all the three kinds of *Stridhūn* mentioned in the text of Yagnavalkya referred to in the last-mentioned Clause is, consequently, beyond all dispute. It would be absurd to contend that the author of the Daya Bhaga has laid down, in the case of property given by a woman's kindred, a rule of succession different from that laid down by him in the case of *Sulka* property, when it is beyond all the question that both those kinds of property are governed by the same text of Yagnavalkya which is cited by him at the very threshold of the discussion.

The next authority to which we wish to refer is the *Daya Tutwa* of *Rughoonundana*. In page 43 of the printed copy, the author says, "In default of barren and widowed daughters the husband succeeds, but this does not relate to property given by parents since in that case the brother succeeds;" and this passage clearly shows that the author of the *Daya Tutwa* is of the same opinion as the author of the *Daya Bhaga*.

It has been said that the mother is not expressly mentioned in the passage above referred to. But this argument does not appear to us to be of any force whatever. The object of the author of the *Daya Tutwa* was merely to indicate the line of succession and not to enumerate all the heirs, one after the other; and as the right of the mother and father to come in immediately after the brother did not admit of any dispute or doubt, it was sufficient for his purpose to say that the brother, and not the husband, is entitled to succeed to property given to a woman by her parents. There is nothing in the *Daya Tutwa* or in any other work in Hindoo law that we are aware of, on the strength of which it can be contended that the husband is entitled to come in between the brother and the mother.

The author of *Vivada Bhungarnaba*, also appears to be of the same opinion, as may be seen from the following text of *Catyana* quoted by him in page 317 of the 4th volume of *Colebrooke's Digest*.

"On failure of her parents and brothers what she received from her kinsmen as a gift, descends to her husband."

Much stress has been laid by the pleader for the appellant on para 3, Section 5, Chapter II of the *Daya Crama Sungraha* of *Sree-kissen Turkoluncker*. That paragraph is as follows:—

"Next the succession devolves on the barren and widowed daughters, and in default of all daughters the *son and the rest* succeed as in the case of property received at nuptials;" for a text of *Menu* declares: "The wealth of a woman which has been in any manner given to her by her father and mother, let the *Brahmani* damsel take or let it belong to her offspring."

It has been argued that in the case of property received at nuptials celebrated in the *Brahma* form the husband is entitled to come in immediately after the great-grand-

son of the co-wife, in preference to the brother, mother and father, and as the marriage of the lady to whose property this dispute relates, was admittedly celebrated in the *Brahma* form, the plaintiff, as her husband and not her mother is the preferential heir under the authority of the paragraph quoted above. This contention however does not appear to us to be sound. No doubt, if the paragraph in question had stood alone, there might have been considerable force in the argument that the word "*rest*" on the phrase "*the son and the rest*" includes not only all the heirs down to the great-grandson of the co-wife, but also the husband, the brother, the mother, and the father, who are entitled to come in after such great grandson. But such a construction would be directly contrary to the provisions of the 15th and 16th paragraphs of the 3rd Section of the same Chapter, in which it is distinctly laid down that in the case of property given to a woman by her father and mother, the brother is entitled to succeed (without any reference whatever to the form of marriage) if she die without issue. Those two paragraphs as translated by Mr. Wynch stand as follow:—

Para 15. On failure of her husband the brother is the next successor, according to the text of *Yagna Valkya*: "That which was given to her by her kindred as well as her fee or gratuity, and any thing bestowed after marriage, her kinsmen take if she die without issue."

Para 16. "The term *kindred* means her father and mother, and consequently by the term kinsmen her brothers are signified. The same is declared by *Catayana*, who says, "Immoveable property which has been given by parents to their daughters, goes *always* to her brother if she die without issue. Here since the terms immoveable property are used, other property is, of course, intended by the argument drawn from the loaf and staff. Thus it is stated in the *Daya Bhaga*. By the use of the term *always* it appears that the eight forms of marriage; namely, *Brahma* and the rest are included."

It should be borne in mind that the original work is not divided into chapters, sections and paragraphs, and that there are two errors of printing in paragraph 15 as quoted above.

In the first place there should be a full stop after the word "*successor*," and in the

next place the words "according to the text of Yagna Valkya" ought to be read as commencing a new sentence, having no connection whatever with the first portion of that paragraph (down to the word "*successor*," which relates to property received by a woman at her nuptials.

These two paragraphs, therefore, clearly shew that there is no conflict between the Dayacrama Sungraha and the Daya Bhaga in regard to the brother's right to succeed to property given to a woman by her parents, *if she die without issue*. On the contrary the author of the Daya Crama Sungraha expressly adopts the view taken by the author of the Daya Bhaga, as may be seen from the words. "Thus stated in the Daya Bhaga," in paragraph 16. How then are we to reconcile these two paragraphs with paragraph 3 section 5, chapter 3. It cannot be said that the author of the Daya Crama Sungraha has been guilty of laying down two contradictory rules in two different parts of the same work, and the only way of escaping from this difficulty is to hold, as we think we are bound to do, that the word "*rest*" in paragraph 3, section 5, chapter 2, includes all the heirs down to the great-grandson of the co-wife, but not those who are entitled to come in after such great-grandson.

For the above reasons we dismiss this Special Appeal and affirm the judgment of the Lower Appellate Court with costs.

THE 15TH MARCH 1873.

*Present :*

The Hon'ble DWARKANATH MITTER, } *Judges.*  
 " " E. G. BIRCH, }

” ” E. G. BIRCH,

CASE No. 866 OF 1872.

*Special Appeal from a decision passed by the Judge of Midnapore, dated the 14th March 1872, reversing a decree of the Additional Sudder Moonsiff of that district, dated the 22nd September 1871.*

Santiram Panja and others ... { Plaintiffs,  
versus { Appellants,

Boycunt Panja and others... { Defendants,  
Respondents.

*For Appellants.*—Babor Bhojrub Chunder  
Bancrjee.

*For Respondents.*—Baboo Jadub Chunder  
Seal.

A case brought under Section 37, Act VIII of 1869, B. C., is governed by the principle of the decisions reported 16, W. R., page 126, and 18 W. R., page 332.

In this Special Appeal, we think we are bound to follow the principle laid down in the decisions reported in page 126, Vol. XVI, and in page 332, Vol. XVIII, of the Weekly Reporter. It has been argued that these were cases decided with special reference to the provisions of Section 10, Act VI of 1862, and Section 38, Act VIII of 1869, of the Bengal Council. But the principle of those decisions appears to be equally applicable to a case like the present, which is brought under Section 37 of the last mentioned Act. The same words "proprietor of the estate or tenure" which occur in Section 38, also occur in Section 25, and as it is by Section 25, that "the right to measure," referred to in Section 37, is to be determined, the distinction relied upon by the appellants must necessarily fall to the ground.

**We reject the Special Appeal with costs.**

THE 18TH MARCH 1873.

*Present:*

The Hon. LOUIS S. JACKSON and  
 „ DWARKANATH MITTER, } *Judges.*

CASE No. 967 OF 1871.

*Special Appeal from a decision passed by the Judge of 24-Pergunnahs, dated the 30th May 1871, affirming a decree of the Sudder Moonsiff of Alipore, dated the 31st August 1870.*

Kally Coomar Chatterjee, Nazir  
of the Collector of twenty-  
four Pergunnahs, defendant... *Appellant*,

*versus*  
Siddhessur Mundul, inhabitant  
of Kochooa, plaintiff ... Respondent.

*For Appellant.*—Baboo Sreenath Doss.

*For Respondent.*—Baboo Nil Madhub Bose.

When property attached in execution of a decree is not re-delivered agreeably to a Writ entrusted to a peon for restoration of the property, the Nazir is not directly liable, to indemnify the person whose property is not so re-delivered.

*Jackson, J., (Mitter, J., concurring.)*—The plaintiff in this case was the defendant in a suit before the Revenue Court under Act X of 1859. At the instance of the plaintiff in that suit the Collector ordered the attachment of certain movable property belonging to the now plaintiff Siddhessur Mundul. The Collector's warrant which was a printed document being one of the forms

prescribed for adoption by the Revenue Courts was, it seems, addressed to the Nazir of the Collector's Court, *viz.*, Kally Coomar Chatterjee, the present defendant. This Purwana or warrant was made over by the Nazir to one of the peons on the Collectors' establishment. The peon, it seems, reported that he had attached certain property which was specified and made it over to the charge of several persons on whose part he produced a document called zimmanamah. The defendant in the rent suit, now the plaintiff, afterwards deposited the amount required to satisfy the rent decree and a further order was issued to the Nazir to release the property attached. The plaintiffs' allegation in the present suit is that the property which had been so attached was not redelivered to him, and on that account he sues the Collectorate Nazir as responsible for the loss which accrued to him in consequence. Both the Moonsiff of Alipore and the Zillah Judge of 24-Pergunnahs has concurrently held that the Nazir is liable and have given judgment against him for the full amount claimed. The case comes before us in Special Appeal, and the principal point which we have to decide is whether under the circumstances there is any personal liability attaching to the Nazir. The view taken by the Zillah Judge in his decision which is the one immediately before us is contained in the part of the judgment which I am about to read. He says:—"It is true that the responsibility of the Nazir is not declared in Section 99 Act X of 1859 in the same express terms which are used in Section 233 Act VIII of 1859, but it appears to me that such an express declaration was not requisite in either case. An action assuredly would not lie against the Nazir for the act of attachment or for any other act done in execution of the order of the Court, but it does lie here because he does not execute the order of the Court for the restoration of the property, and because his inability to restore the property arises from his own negligence and want of due care of the property of which he assumed the custody. The officer executing the writ is the Nazir and not the Peadah who is a mere Subordinate of the Nazir; an agent whom he is empowered to employ, but not an agent on whom he is empowered to devolve his own liabilities. The appellant contends that under the terms of Section

"4 Bengal Act V of 1863, the Peadah is the only officer who can be employed in the service or execution of the process of the Court, but he selects his own Peadahs and it does not follow that he is relieved from his responsibility by his employment of the authorized services of the persons whom he appoints with the sanction of the Court." He afterwards says:—"The writ as the Moonsiff shews is directed to the Nazir, and he is bound to see that it is properly executed either by himself or by his Peadahs, and if loss arises from his want of due care either personally or through his subordinates, he is responsible for it." The Government Advocate appeared in this case, and although we could not see that the Government had any direct interest in the matter, not being a party to the suit, we gladly heard the learned gentleman, and are much indebted to him for the assistance which he has rendered to the Court in the decision of this case. It was contended amongst other things that both the Nazir and the peon who was the officer immediately employed to execute the warrant, are paid servants of Government, and one servant is not responsible for the acts of the others; that the Nazir like all Nazirs of the Civil Court has now no interest in the fees leviable as tullubamah for serving processes; that there is no analogy between office of a Nazir and that of a sheriff of an English County as supposed by the Courts below; that the peon was a public servant and that if the warrant in this case was addressed to the Nazir it was so done in contravention of the terms of Act V of 1863 B. C., and accordingly it is contended that the writ ought to have been addressed to the peon, and that the common practice in this matter was to make over warrants of Courts, though addressed to the Nazir to the Subordinate Peadahs for execution. Mr. Bell—I should mention at the close of his argument proposed to point out who was the real person who ought to have been sued and who was liable for the demand, and he contended that the Moonsiff ought to have made the parties who were really liable defendants in the suit. As to this contention I may observe that, when plaintiff brings a suit against a person who is not liable to him for the particular matter for which the suit is brought, it is not for the Court to go on and find out who is the person really liable to plaintiff, and as it was altogether foreign to



the purposes of this appeal to consider who, if not the Nazir, was liable, we did not think it necessary to enter into that part of the case.

The Moonsiff who decided the suit in the first instance laid considerable stress upon the terms of Section 87 Act X of 1859, and the form, being I understand the form (E.) annexed to that Act and which is prescribed by Section 86 of that Act, Section 86 was repeated by Act VI of 1862 B. C., and instead of that we have Section 17 of Act VI of which the last words are "Process of execution against the person or movable property of a debtor shall be in the form (E.) or the Form (F.) contained in the schedule to Act X of 1859, or in a Form as nearly resembling those Forms as the circumstances of the case may admit." Now, subsequent to the passing of Act X of 1859, and before the bringing of this suit a material change in the law regulating the machinery for executing processes of Courts, including the Courts of the Collector, had taken place by the repeal of Section 14, the only then surviving part of Regulation XXVI of 1814 and by the enactment of Act V of 1863 (B. C.). When Act X of 1859 was enacted, not only the Regulation of 1814 but also Regulation V of 1804 Sections 12 and 13 were in force, and by these two provisions taken together it was provided that all orders and processes of the Civil Courts and Revenue Officers were to be executed by the Nazirs of those Courts who were permitted to appoint their own Mirdhas and peons and who received as their remuneration  $\frac{1}{4}$ th of the tullubannah paid in each case to the peon who carried the several processes and orders. Under that state of things, a large portion, nearly the whole of a Nazir's receipts, was derived from such deductions and other fees received by him, and most probably in consideration of that circumstance, the Nazir might have been held responsible for the acts of his peons resulting in wrongful damage to parties. That was entirely changed by Act V of 1863 B. C., and the peon as well as the Nazir became, it seems to me, a regular paid officer of Government. It was left to the discretion of the Executive Government to direct that the peons should be either paid by fixed salary or remunerated by fees, but the peculiar connection which previously existed between the Nazir and the peon, was entirely severed.

The Nazir had the nomination of them subject to the approval of the Judge (and in this case of the Collector), but he had not the power to remove them nor had he power to employ any person other than a peon appointed under that Act in the service or execution of any process of Court except with the special leave of the Court. I do not propose to consider here the relation between an English Sheriff and a Nazir, because I am clearly of opinion that there is no analogy whatever between the case of a Sheriff and the case of a Nazir. The Moonsiff observes referring to the provisions of Section 87 and 99 Act X of 1859: "These provisions show that an officer and not a peon is to execute such writs, that he is actually and manually to take moveables out of the judgment-debtors' possession, and deposit them in some fit place or keep them in the custody of some fit person approved by himself." I do not quite know what in the Moonsiff's mind was the distinction between a peon and an officer, but if he meant to say that the Nazir is an officer and the peon is not, and that the Nazir is actually and manually to take moveables out of the judgment-debtors' possession and deposit them in some fit custody, I fear that unless Nazirs are provided with some physical apparatus beyond that which is commonly given to men it would be absolutely impossible for them to undertake such duties, and if to the performance of these manual functions is to be attached a corresponding liability in such matters I apprehend no pecuniary inducement will be sufficient to induce a person of respectability to accept so burthensome an office. Section 8, Act V of 1863 (B. C.) provides:—"On every process issued for service or execution by any peon appointed under this Act, there shall be endorsed the name of the peon deputed to serve or execute the same, the period within which the peon is required to certify service or execution, the amount payable for the service or execution of the process, and the date of payment and such endorsement shall be signed by the Nazir or clerk of the Court." This provision recognizes distinctly that it is the peon who serves and executes, and it is the peon from whom certificate of service or execution is to be taken, and if in addition to such certificate of service which in my experience is always furnished by the peon, the Nazir appends some further certi-

ificate of his own, that, it seems to me, is not sufficient to entail on him any pecuniary responsibility, and does not affect the reality of the service by the peon. The Judge finds in this case that the property in respect of which the damages were claimed had been removed from the possession of the present plaintiff who was the defendant in the rent suit, but he says: "It is not material in this suit to find whether the zimmdars held it or the decreeholders; for, if the Nazir is primarily responsible, he may settle with those who took the property, and if the Nazir is not primarily responsible, this suit must fail, because he has been made the sole defendant." It appears to me that it was highly material to find whether the zimmdar or the decreeholder held the property, because the law does not so far as I know it authorize the making over of the property attached to the decreeholder's custody, but it does in Section 99 expressly authorize the property being left in the custody of some fit person, meaning thereby, I suppose, some independent and respectable person. The Judge states that an action lies here, because the Nazir does not execute the order of the Court for the restoration of the property. In the present case it seems that the order of attachment was executed by one peon and the order for restoration of the property entrusted to another. I confess I am unable to see how the Nazir under the circumstances failed to execute the order of the Court for the restoration of the property. Then it is said that the "inability of the Nazir to restore the property arises from his own negligence." It appears to me that there was no negligence on the part of the Nazir. He entrusted the Perwannah to a peon who was appointed with the sanction of the Court expressly for the purpose of such duties—and the return of the peon with the Nazir's certificate upon it, was submitted in due course to the officer presiding in the Collector's Court, and was presumably approved by him. I have already said that in my opinion the officer executing the writ was not the Nazir, that the Peadah was not a mere subordinate of the Nazir and an agent whom he had power to employ, but who, although, in a subordinate capacity, was as much an officer of the Collector's Court as the Nazir himself. In this view of the case it appears to me that the Nazir is not directly liable as held by the Courts

below to indemnify the plaintiff, and it is not our function to settle here who is the person, if any liable.

I am reminded that there is no specific allegation of misconduct against the Nazir in this case, but only a charge of implied neglect. The question therefore turns upon the general liability of the Nazir.

The judgments of the Lower Courts are set aside, and the plaintiff's suit is dismissed with all costs.

THE 20TH MARCH 1873.

*Present:*

The Hon'ble W. MARKBY, } *Judges.*  
 „ E. G. BIRCH, }

CASE NO. 794 OF 1872.

*Special Appeal from a decision passed by the Officiating Judge of Hooghly, dated the 18th January 1872, modifying a decree of the second Subordinate Judge of that district, dated the 17th June 1871.*

Aga Abbas Teharany, defendant... *Appellant,*  
*versus*

Bipin Behary Mullick, plaintiff,... *Respondent.*

*For Appellant.*—Baboo Boyceunt Nauth Paul.

*For Respondent.*—Baboos Hem Chunder Banerjee and Romesh Chunder Mitter.

A deposit having been made with a lessor as security for rent under an implied contract that the sum would not be drawn upon for the first year and only in part for the second, it was held that the lessor had a right, in case the rent should not be paid then, to take it out of the deposit.]

*Mr. Justice Markby, (Birch, J., concurring).*—The questions for our consideration in this case turn upon the construction of two documents, one an Ijarah lease of certain lands to a person, named Mussoollah, and the other a kobalah by which that Ijarah lease was transferred to the plaintiff. The question upon the kobalah is whether under it the rights which the lessee had in the deposit made with his lessor at the time of the creation of the Ijarah passed to the plaintiff. The District Judge differing in opinion in that respect from the Subordinate Judge found that those rights had passed and so far we agree with him.

Then arises the question upon the Ijarah lease. Taking the whole of that document together we think the contention of the parties was, that the deposit made with the lessor should be a security for the rent. No doubt it was implied that that sum would not in any way be drawn upon for the first year, and only in part for the second. But there is nothing in our opinion which displaces the very clear right which the lessor had under the clause quoted by the District Judge, in case the rent should not be paid then, to take it out of the deposit. We think therefore that the District Judge is wrong in that part of his judgment in which he holds that the whole of the deposit may be recovered, and that the defendant is bound to establish his claim for rent due by a suit for that purpose. Now, that being so what remains to be considered is this:—The defendant stated that the farmer never paid in any rent at all, and that on the accounts being made up it would appear that over and above the one thousand rupees in deposit, one hundred and eighty rupees and two annas were due to him at the time when he took possession in Aughran 1274. Of course in the view the District Judge took of this case, he did not go into that question. But now that question must be decided. What the District Judge has to do is to find whether any sum was due for rent from the Ijarahdar in Aughran, 1274, when the defendant took possession, and whatever was then due must be deducted from the deposit, and if there is any thing still due, the plaintiff will get a decree for it; but on the other hand, if what was due equals or exceeds the deposit, the suit will have to be dismissed.

The costs of remand will abide the result.

THE 21ST MARCH 1873.

*Present:*

The Hon'ble R. COUCH, Knight, *Chief Justice.*

The Hon'ble J. B. PHEAR, and } *Judges.*  
" " W. AINSLIE, }

CASE No. 189 OF 1872.

*Regular Appeal from a decision passed by the Subordinate Judge of Zillah Tirhoot, dated the 27th of May 1872.*

Bissessur Lall Sahoo and Sood-rishtee Lall, plaintiffs, ... *Appellants,*  
*versus*

Ram Tohul Singh and William Campbell, and in place of the latter, Trevor Loyd and Brojo Nath Sookool for self, and as heir of the late Sheo Prosad Sookool, who appeared and Ram Chorose Singh, Bhoop Narain Singh and Domee Lall, Gour Pershad Singh, who did not appear in this appeal, defendants, ... *Respondents.*

SUIT LAID AT RUPEES 11,714-10-8.

*For Appellants.*—Mr. G. H. P. Evans, Baboos Mohesh Chunder Chowdhry and Unnoda Pershad Banerjee.

*For Respondents.*—Mr. Advocate General, Messrs. Chautrel Knowles, Roberts and Baboo Chunder Madhub Ghose.

A sale for arrears of Government revenue having been set aside, the purchaser of the right, title and interest of the defaulter in the surplus sale proceeds is entitled in equity to have back his purchase money, his costs being paid by the defaulter whose right, title and interest in the said surplus proceeds of sale, were sold by his judgment-creditor.

*The Chief Justice (Phear and Ainslie, J. J., concurring.)*—In this case the plaintiffs sought to recover from the defendants 11,714 Rupees, 10 annas, and 8 pies, for principal and interest of money which they had paid upon a sale to them on the 18th February 1868. Their case was, that Sheopershad Singh, who is dead and is represented in this suit by the second defendant, having got a decree against the first defendant, Ram Tohul Singh, in order to realize the amount, caused the rights and interests of Ram Tohul Singh in certain surplus proceeds of property which had been sold by

auction for arrears of Government Revenue, and after sanction and confirmation of the sale, was held in deposit by the Collector in the name of Ram Tohul Singh and his co-sharers, to be attached and sold on the 18th February 1868; that the plaintiffs purchased those rights and interests for Rs. 8,000 in the name of Juldharee pandah; that the money being put into Court and the sale confirmed, Rs. 4,970, 19 annas, 3 $\frac{1}{2}$  pies was taken out by Sheopershad Singh on account of his decree, and the remainder by other decree-holders who have been made parties to the suit and are the third, fourth and fifth defendants; and that upon the plaintiffs applying to the Collector to make over to them the sum of 35,520 Rs., 14 annas, the share of Ram Tohul Singh in the surplus money, their application was rejected on the ground that the sale for arrears of Government revenue had been set aside. This is the fact, and it is stated that the decision of this Court setting it aside is now under appeal to Her Majesty in Council.

The case in IV Bengal Law Reports, page 11, Full Bench Rulings, is different from the present, and the decision there does not, I think, apply to it. There the plaintiff had lost the property which he had bought in consequence of its being found that the judgment debtor had no title whatever to it, a third person having recovered it by showing that he was the person lawfully entitled to it. In the present case, the loss to the plaintiff was caused not by the judgment-debtor having no title to the property, but by his asserting his title and by virtue of his getting the sale set aside. He has obtained a decree of this Court by which he has recovered the property, and if the plaintiffs do not succeed in the present suit, he will not only keep it, but will get debts to the amount of 8,000 rupees, for which his property was liable to be attached and sold, paid with the plaintiffs' money.

I think the rule that ought to be applied in this case is that which is applied by Courts of Equity where sales are set aside on account of fraud, or for other reasons which are held by the Court to vitiate the sale, Lord Cottenham, in *Bellamy versus Sabine*, 11. Phillips, page 425, says as to such cases:—"The Court proceeds upon the ground that as the transaction ought never to have taken place, so the rights of the parties are as far as possible to be placed in the situation in which they would have stood

if there had never been any such transaction." That rule is applied by him in the case quoted to the setting aside a conveyance on account of fraud and ordering a reconveyance. If in such a case the purchaser is to have back his purchase money, it is equitable that he should in the present case. The rule is also applied where an annuity is set aside on account of a defect in the memorial; an account is taken and the defendant, the purchaser of the annuity, is allowed his principal and interest and costs. The remarks of the Subordinate Judge in regard to the nature of this purchase by the plaintiff, might in many cases be applied to the purchase of an annuity—frequently a very speculative transaction. There is also another instance which may be mentioned, in the case of *Bolcher versus Vardon II*, Collier page 175, where securities were set aside on account of usury at the instance of the Assignees of a Bankrupt. In that case the defendant had leave to prove his advances with legal interest.

I am of opinion that the rules ought to be applied in the present case, and that the plaintiffs are entitled to be restored to the position in which they would have been if the sale for the Government revenue had not taken place. It is a mistake to apply to a case like the present the rule stated in Addison on 'contracts,' as to voluntary payments. The payment here was not voluntary; it was made on account of the purchase, and is not to be regarded as a voluntary payment. It is true that the plaintiffs were not parties to the sale and purchase which was set aside. They bought the interest in the surplus, but the consequence of the judgment-debtor succeeding in setting aside the Government sale was to obliterate the surplus and prevent the plaintiffs from getting any part from it. I think the proper course would have been to have made the present plaintiffs parties to the suit for setting aside the Government sale, if the purchase by the plaintiff was confirmed before the hearing of the suit, as they had an interest in the sale not being set aside and would be affected by the result. It does not appear when the suit for setting aside the sale was heard. If they had been parties to that suit, the Court, in making the decree setting aside the sale, ought, and it must be presumed, would have directed that it should be set aside upon the plaintiff therein paying to the present plaintiffs the money which they

had paid. Lord Cottenham says, the passage which follows the one I have quoted, "In setting aside sales of this kind, the Court considers the purchaser as in the situation of a mortgagee so far as he has made payments in consequence of the sale." On that ground, therefore, I think the plaintiffs are entitled to succeed in the present suit and to recover what they have claimed for the principal money and interest.

In consequence of an appeal being now pending in the Privy Council, it is necessary to declare that should it be successful and the decree of this Court be reversed, and the sale for arrears of revenue stand good, the present plaintiffs are not to have any rights whatever in consequence of it. By bringing this suit, they elect to consider the sale as set aside and to have back their purchase money. Having made their election and treated the sale as set aside, they cannot take advantage of any decision that may be made by the Privy Council reversing that. They must abide by what they now ask for, and the sale, so far as they are concerned, must be treated as finally set aside.

Then, the next question to be considered is in regard to the costs. The plaintiffs have shown that they are entitled to succeed in the suit, and the person who is liable to pay the money is the first defendant, Ram Tohul Singh, and he ought to pay the plaintiffs' costs of the suit.

As to the second defendant, the representative of Sheo Pershad Singh, he attached the surplus in the hands of the Collector, which he had the right to do, but then he ought to have ascertained whether, instead of putting up to sale the share of the surplus, which seems to have amounted to more than 35,000 Rupees, he could not have obtained an order to have the amount which was due to him, 4,970 Rs. 9 annas 3½ pies, paid to him. His conduct appears to be such that he ought not to receive his costs, but ought to be made to pay them himself.

As to the third, fourth, fifth and sixth defendants, namely, the other decreeholders who were paid out of what remained of the purchase-money paid by the plaintiffs after satisfying Sheo Pershad Singh, they do not appear deserving of any blame. They received their money from the Court out of what remained after satisfying the attaching creditor, and they ought not to have been made parties to the suit. The plaintiffs must therefore pay their costs.

There will be a decree accordingly and the plaintiffs will recover from the first defendant the amount claimed with costs.

THE 1ST APRIL 1873.

Present:

The Hon'ble Sir RICHARD COUCH, ... .. *Kt., Chief Justice,*

The Hon'ble LOUIS S. JACKSON, }  
" " J. B. PHEAR, } *Judges.*  
" " W. MARKBY and  
" " W. AINSLIE, }

*Res Judicata—Collector's Judgment—Act X of 1859 s. 23 cl. 6.*

CASES NOS. 1035 AND 1036 OF 1870.

*Special Appeals from a decision passed by the Judge of Twenty-four Pergunnahs, dated the 19th March 1870, reversing a decision of the Additional Moonsiff of Alipore, dated the 30th April 1869.*

Chunder Coomar Mundul and others, (plaintiffs) ... .. *Appellants,*  
*versus*

Namni Khanum, (defendant) ... .. *Respondent.*  
*For Appellants.*—Messrs. J. T. Woodroffe, J. S. Rochfort and Baboo Gopeenath Mookerjee.

*For Respondent.*—Mr. R. E. Twidale.

In a suit brought by a ryot to recover possession of certain lands under Clause 6, Section 26, Act X of 1859, the Deputy Collector found the potta put in by the ryot to be genuine and restored him to possession.

The landlord then sued the heirs of the ryot after his death in the Civil Court to recover possession of the same lands on the allegation that the potta was a spurious document.

Held by the Full Bench that the decision of the Deputy Collector upon the issue now before the Civil Court, although he was competent to try that issue for the purposes of the suit before him, did not effect a *res ad judicata* between the parties for all other purposes.

*These cases were referred to the Full Bench under the following orders recorded by Jackson and Mitter, JJ.:—*

*Jackson, J., No. 1035.*—The question raised on this special appeal is certainly not free from doubt. It is one on which the two Judges constituting the present Bench are not entirely agreed, and under any circumstances, I should think it more advisable to abstain from pronouncing judgment in a case where that is so.

But in the present case the state of the authorities is one which entitles us to abstain from coming to a final decision, and to refer the question for the decision of a Full Bench.

In a case decided by a Division Bench of this Court, in which my learned colleague was one of the Judges, (*Haradhun Doy vs. Golam Hossein*, VIII Weekly Reporter, page 487), it has been determined, without much argument, so far as we can discover from the judgment, that "the judgment of the Collector in the matter of the genuineness of the pottah is the judgment of a Court competent to determine that question, in order to the determination of the further question of rent or of ejectment; but as it is not the judgment of a Court of concurrent jurisdiction with the Civil Courts it cannot be pleaded as an estoppel in the Civil Court in an action for ejectment of the defendant as a trespasser."

That ruling has been relied on as an authority for contending in the present case, that the plaintiffs, whose suit was to eject the descendants of one Bakir Ali, claiming to hold as hereditary *mokurureedars*, are not precluded by a previous decision of the Collector's Court in favor of the same Bakir Ali, in a suit brought by him against the *zemindars* (who are identical in title with the present plaintiffs) under Clause 6, Section 23 of Act X of 1859.

In pronouncing the judgment which I have just cited, Mr. Justice Loch refers in support of the view taken to a then recent judgment reported in VIII Weekly Reporter, page 177, in which difference of opinion having occurred between the two Judges of a Division Bench (Mr. Justice Campbell and Mr. Justice Phear), the matter was re-argued before the learned Chief Justice; and Sir Barnes Peacock, concurring with Mr. Justice Phear, held that the Collector's Court and Judge's Court were not Courts of concurrent jurisdiction, and therefore that the decision of the Collector is not conclusive except on the question of rent.

The matter which was under the consideration in that case was very different from the matter in the present case. The question there was, whether in a suit for rent, the defendant having set up a *zur-i-peshgee* *thicca* bond, and the Collector's Court having decided in favor of the validity of that bond, such decision was afterwards conclusive and

binding in a suit on that bond in a Civil Court.

It is somewhat remarkable that in a case occurring sometime afterwards before a Division Bench of this Court, in which Mr. Justice Loch was the senior Judge, namely, in the case of *Hur Lall Shaha vs. Tirthanund Thakoor* (XIII Weekly Reporter, page 417), that learned Judge and Mr. Justice Hobhouse, delivering separate judgments in a case which appears to me extremely similar to the present case, held—Mr. Justice Loch as follows:—"This question having already been determined by the Collector, who had jurisdiction to try it, and whose Court was a Court of concurrent jurisdiction, I think that it is not now again open for trial in the Civil Court, and therefore the judgment of the Lower Appellate Court must be upheld, and the special appeal dismissed with costs."

Mr. Justice Hobhouse used words somewhat to the same effect; his words are these:—"The Collector could not determine that the ejectment in the former suit was illegal until he had determined that the pottah which the present plaintiff now denies, was a true pottah. He had, therefore, obviously jurisdiction to determine whether that pottah was a true pottah or not. Having jurisdiction he did determine that the pottah was a good one, and determined it as between the parties now before us. This being so, the Collector did, I think, determine in the suit of 1868, and had jurisdiction to determine, the very point now in question before us, and so the matter is *res judicata*."

In delivering judgment in that case, Mr. Justice Loch referred to the judgment of the Full Bench in VII Weekly Reporter, page 186, but does not refer to the case which he himself had previously decided, and which is reported in VIII Weekly Reporter.

The mode in which the decision of the Full Bench (to be found in VII Weekly Reporter, page 186) is made to bear on the present case is this, that in that case the Full Bench expressed the opinion that the words, "suits to recover occupancy or possession of any land," &c., in Clause 6, Section 23 of Act X of 1859, refer only to possessory actions against the person entitled to receive the rent, and not to suits in which the plaintiff sets out his title and seeks to

"have his right declared and possession given to him in pursuance of that title."

It seems very probable that the words in Clause 6 Section 23 had express reference to the two provisos in Sections 21 and 22 of the same Act. But I confess that, as at present advised, I do not find anything in the terms of Clause 6 Section 23, which make suits brought under that Clause mere possessory suits, that is to say, I do not see anything which should debar the Collector's Court under Act X from inquiring into any plea which may be set up by the defendant in answer to the plaintiff's suit, that is, that if, are meant by possessory suits such suits as are analogous to suits under Section 14 of the Limitation Act of 1859, I do not find anything in the words of the Legislature to bear out that opinion, and therefore I think that the Court is not authorized in limiting the meaning of the words in a way which the Legislature has not done.

Consequently, if these are not possessory suits, it seems to me that the Collector's Court, in dealing with suits under Clause 6 Section 23, is vested with full jurisdiction to enquire into the matter; and if it was necessary for the plaintiff's purposes in such suit, as between him and the zemindar to set up a mokurree pottah under which he claimed to be entitled to possession, and that pottah were proved to be valid, he would not only be entitled to possession, but to possession as a mokurree. It seems to me, therefore, in the present case, as between Bakir Ali and the zemindar, and between persons claiming under them respectively, that the Collector's decision is a binding decision which the zemindar is not entitled now to dispute or re-open.

This being the present inclination of my opinion, and the authorities being in the state I mention, as also some other authorities which may be cited on either side, I think it preferable to refer the case to the decision of a Full Bench, and not to pass a final decision here.

*Mitter, J.*—I concur in the order of reference.

My views on the question which is now before us, are stated at length in the written judgment which I have just put in.

*Jackson, J.*—It is admitted on both sides that this appeal (No. 1036) will be governed by the order made in Appeal No. 1035, and it must, therefore, likewise be referred to a Full Bench.

*Mitter, J.*—In the year 1866, a man named Bakir Ali brought a suit in the Court of the Deputy Collector, under the provisions of Clause 6, Section 23, Act X of 1859. His allegations were that the lands sued for were held by him under a mowrosee pottah executed by the present plaintiffs, who were made defendants in that case, and that he had been illegally ejected therefrom by them under color of a decree to which he was not a party.

The plaintiffs, in their answer to that suit, urged that there was no relation of landlord and tenant between them and Bakir Ali, and that the mowrosee pottah set up by him was a spurious document.

The Deputy Collector held that the pottah was genuine, and being further of opinion that Bakir Ali had been illegally ejected from his tenure by the plaintiffs, gave a decree to him for the possession of that tenure.

This decree was ultimately confirmed on appeal by the Judge, and a special appeal preferred against the Judge's decision was rejected by a Division Bench of this Court.

The plaintiffs have now brought the present suit in the Civil Court against the heirs of Bakir Ali, who had intermediately died, and their prayer is that they should be restored to the possession of the lands decreed to Bakir Ali in the previous litigation.

The material averments in the plaint are to the effect, that the pottah set up by Bakir Ali was a spurious document; that no mowrosee lease had ever been granted to him by the plaintiffs; that whatever right he might have had during his lifetime to hold possession of the lands in question, his heirs had no right to hold them after his death; that the plaintiffs had called upon them to quit those lands by a notice duly served upon them on the 15th of Chyet 1275; and that they, the plaintiffs, are entitled to obtain khas possession of those lands as the undisputed proprietors thereof. The plaint further states that the cause of action of the plaintiffs accrued on the date of this Court's decision in the special appeal which was preferred by them in the suit under Act X. But this is evidently a mistake. Their real cause of action, according to the plaint, is the refusal of the defendants to surrender the lands.

The defendants urged in their written statement that the plaintiffs were estopped from contending that the pottah set up by their ancestor was not a genuine instrument, inasmuch as that question had been already

set at rest by the final decision of the Deputy Collector in the former suit; that it was unquestionably an authentic and valid mowrosee pottah, and that the plaintiffs had no right to eject them, they being entitled to all the rights and interests of Bakir Ali in the lands in question as his undisputed heirs and legal representatives.

The Court of first instance overruled the plea of *res judicata*, but came to the conclusion that the plaintiffs were not entitled to recover, inasmuch as the pottah was a genuine and valid mowrosee pottah.

On appeal, the Judge has confirmed this decision, but upon the ground that the plaintiffs were stopped from contesting the genuineness of the pottah by the decision of the Deputy Collector, and as the terms of that document clearly showed that the tenure was a mowrosee one, the plaintiffs had no right to eject the heirs of the original grantee.

In special appeal it has been urged, firstly, that the Judge is wrong in holding that a mowrosee tenure was created by the pottah in question; and secondly, that he is also wrong in holding that the plaintiffs are estopped by the decision in the Revenue Court in the former suit from denying the genuineness of that instrument.

With reference to the first point, I am clearly of opinion that the learned Judge is right. If we assume the pottah to be a genuine instrument, there can be no doubt whatever that it is a mowrosee pottah on the very face of it; and I do not, therefore, think it necessary to enter into any further discussion on this point. With reference to the second point, however, I am of opinion that the conclusion arrived at by the learned Judge is not correct.

I confess that I feel considerable difficulty in dealing with the doctrine of *res judicata* in this case. The only statutory provision which we have on the subject is that contained in the second section of our Code of Civil Procedure, and I am bound to say that the decided cases are not altogether in harmony with one another.

It seems to me, however, to be quite clear that the provisions of Section 2 cannot be applied to this case. In order to bring a case within the operation of that Section, three things must be shown, namely, first, that the parties to the two suits under comparison are the same; secondly, that the cause of action is the same; and, thirdly, that that cause of action has been already

heard and determined by a Court of competent jurisdiction.

It must indeed be conceded for the purposes of the present discussion that the parties to this suit and those to the suit brought by Bakir Ali are substantially the same, inasmuch as the defendants are the undisputed legal representatives of that individual. But the causes of action are manifestly different in the two cases. The cause of action in the former suit was the *illegal ejectment of Bakir Ali by the plaintiffs*. But the cause of action upon which the present suit is brought is the *wrongful withholding of possession by the defendants*, who, it is alleged by the plaintiffs, have no right to hold possession after Bakir Ali's death, inasmuch as Bakir Ali had no such right to transmit to them.

Even the learned Judge himself appears to have thought that Section 2 was not applicable to this case. He has fully gone into the question relating to the mowrosee character or otherwise of the tenure; and this, he would never have done, had he been of opinion that the cognizance of this suit was barred by the provisions of that Section.

The phrase "cause of action" used in Section 2 is certainly not susceptible of a very accurate definition; but I think we may safely take it to mean the alleged infraction of right upon which a plaintiff comes to a Court of Justice for relief. This is the sense in which that expression has been used in the other Sections of the Code, as, for instance, in Section 7, and I may add that it has been also used in that sense in the Statute of Limitations. This interpretation, however, would, to a certain extent, restrict the operation of Section 2. That Section, it must be remembered, forms part of Chapter I, which treats of the jurisdiction of the Civil Courts, and the very first Section of that Chapter says that the Civil Courts are bound to take cognizance of all suits not barred by any express statutory enactment. I have referred to this circumstance merely for the purpose of showing that a plea under Section 2 is a plea of *jurisdiction*, and unless the conditions specified in that Section are strictly fulfilled, the Court would be bound to take cognizance of the suit, whatever decision it may ultimately pass upon its merits. In this view, even a change in the position of the parties in the two suits would operate as a bar to the application of Section 2. Suppose, for instance, that the plaintiff in the second



suit was defendant in the first, although the subject-matter is the same in both the suits. The causes of action would be necessarily different. The wrongful act complained of by the plaintiff in the former suit cannot be considered as the cause of action of the plaintiff in the second suit, and Section 2 would be necessarily inapplicable. If the second suit is based upon a state of facts which has come into existence since the decision of the first, that state of facts, if otherwise sufficient, might constitute a fresh cause of action. If, on the other hand, no such new state of facts has happened, the proper answer to the second suit would be not that it is brought upon a cause of action already heard and determined by a Court of competent jurisdiction, and therefore barred by Section 2, but that there is *no* cause of action to support it. Thus, for instance, if the second suit is brought upon the alleged cause of action that the plaintiff has been ejected in execution of a decree duly passed against him by a competent Court in a previous suit brought against him, by the defendant, the legitimate answer would be that the rights of the parties to the property in dispute have been already set at rest by a decision which has become final in all its legal consequences; and as the ejectment of a party in execution of a decree duly passed against him is not a valid cause of action, the suit must fail not upon the ground that its cognizance is barred by Section 2, but upon the ground that it has no legal foundation, as every suit must be based upon a proper cause of action. Suppose, for instance, that Bakir Ali himself had been alive, and suppose, also, that a suit had been brought against him on the expiration of the year in which he was restored to possession by the Deputy Collector, upon the ground that he had no right to hold those lands permanently. Whether the plaintiffs could have succeeded in such a suit or not, is a different question. But it is perfectly clear that the cause of action would have been different from that determined in the former suit by the Deputy Collector, and the Court would have been bound to determine it upon its merits in spite of the provisions of Section 2. The preceding observations are, I believe, sufficient to show that Section 2 has no bearing upon this case. But there is another mode in which the decision of a competent Court in a previous suit is used against the parties to that suit in a subsequent litigation between

them. I mean in the shape of an estoppel. The late learned Chief Justice of this Court seems to have thrown considerable doubts upon the propriety of introducing the doctrine of estoppels in this country in the judgment delivered by him in the case of *Mussamut Edun*, reported in page 175 of the 8th Weekly Reporter. That doctrine, it was observed, is one peculiar to the law of England. It is intimately connected with the English law of pleadings which has no existence in our Courts; and as its tendency is to shut out the truth, it may well be doubted whether those Courts, which are by their very constitution Courts of equity and good conscience, would be justified in adopting a doctrine which has such a tendency. But if we are at all to adopt this doctrine upon the ground of public policy or otherwise, we must adopt it with all the limitations and restrictions which the wisdom of its framers has engrafted upon it.

One of the leading authorities on the subject of estoppel is to be found in the celebrated case of the *Duchess of Kingston*.\* The chief propositions of law laid down by the learned Judges who were consulted in that case are—

*“Firstly.*—That the judgment of a Court of concurrent jurisdiction directly upon the point is, as a plea, a bar, or as evidence conclusive between the parties upon the same matter directly in question in another Court.

*“Secondly.*—That the judgment of a Court of exclusive jurisdiction directly upon the point is in like manner conclusive upon the same matter coming incidentally in question in another Court for a different purpose.

*“Thirdly.*—That neither the judgment of a concurrent or exclusive jurisdiction is evidence of any matter which came collaterally in question, though within their jurisdiction, nor of any matter incidentally cognizable, nor of any matter to be inferred by argument from the judgment.”

The first two propositions raise a distinction between Courts of concurrent and Courts of exclusive jurisdiction, which it is of the highest importance to bear in mind. This distinction is the basis of the decision delivered by the learned Chief Justice in the case referred to by me, and I will, therefore,

\* 2 Smith's L. C., 679.

confine myself to the discussion of the question as to how far the case now before us is affected by it. \*

The learned Judge in the Court below says, "that, as the Revenue Court would have jurisdiction in this case to eject the defendants, the previous decision of the Revenue Court is final and conclusive in this Court." But the learned Judge is evidently wrong in assuming that "the Revenue Court would have jurisdiction in this case to eject the defendants." That Court had jurisdiction, and it must be admitted exclusive jurisdiction, over "all suits to recover the occupancy or possession of any land, farm, or tenure from which a ryot, farmer, or tenant has been *illegally ejected* by the person entitled to receive rent for the same." But it had no jurisdiction whatever over a suit like the present, which is brought for the ejectment of parties, who, if the plaintiff's case is a true one, cannot be regarded in any other light than that of trespassers. A suit by a landlord to eject a tenant, or to cancel a lease, was cognizable by the Revenue Court under Clause 5 Section 23 Act X of 1859, provided that it was brought upon the ground of non-payment of rent or of breach of the conditions of the lease; but there is no provision in that Act for a suit of this description. It is clear, therefore, that so far as this suit is concerned, the Court of the Deputy Collector cannot be regarded either as a Court of concurrent or of exclusive jurisdiction, and hence it follows that the decision of that Court in the suit brought by Bakir Ali cannot be treated as an estoppel in the present litigation. Suppose, for instance, that the Deputy Collector had found the pottah to be a genuine instrument in a paltry suit for arrears of rent. Could it have been possibly contended that that decision would have operated as an estoppel in a suit brought by the plaintiffs for the land itself which would be undoubtedly a suit within the exclusive jurisdiction of the Civil Court. "It is clear therefore," observed the late learned Chief Justice in the case already cited, "that to render a judgment in such cases conclusive, the Courts must be Courts of concurrent jurisdiction. The validity of an instrument involving a title to lands worth a lac of rupees might have to be tried for some purpose in the Court of Deputy Collector with no appeal to the Collector, or before a Small Cause Court from which

"there is no appeal. If the view taken by Mr. Justice Campbell is correct, this decision would be conclusive upon every other Court in which the validity of the same deed might come in question for an entirely different purpose, and in a claim for a very large amount. It appears to me, therefore, that the rule which is laid down, namely, that to render a judgment of one Court between the same parties upon the same point conclusive in another Court, the two Courts must be Courts of concurrent jurisdiction. Concurrence of jurisdiction is a necessary part of the rule which creates an estoppel in such a case."

But the third and last proposition seems to be equally fatal to the application of the doctrine of estoppels in this case. Let us consider for a moment what was the question which the Deputy Collector had *directly* before him in the suit brought by Bakir Ali. That question was, I apprehend, nothing more than this, namely, whether Bakir Ali had been illegally ejected from his tenure by the present plaintiffs. This view is fully supported by the Full Bench decision of this Court, reported in page 186 of the 7th volume of the Weekly Reporter. In that case it was expressly laid down that Clause 6 Section 23 Act X of 1859 refers only to "*possessory actions on the ground of illegal ejectment*;" and that the Civil Courts are, therefore, fully competent to take cognizance of suits brought by tenants for the recovery of their tenures on proof of *title*, notwithstanding the concluding words of Section 23 Act X of 1859, which gave exclusive jurisdiction to the Revenue Courts over all suits described in that Clause. The learned Judge says that this case has no bearing upon the point now in dispute. But the principle upon which it was decided is of the utmost importance, inasmuch as it shows clearly that a suit under Clause 6 Section 23 Act X of 1859, being essentially a suit of a possessory character, the only question which can directly arise before the Revenue Courts in those suits is the question of *illegal ejectment*. It is true that the Collector has to try whether there is a subsisting relation of landlord and tenant between the parties to such a suit before he can assume jurisdiction over it, but that is a matter purely incidental to the main question, namely, that of illegal ejectment. It has been said that the Full Bench decision just now cited has been virtually overruled, or at

least modified, by a subsequent Full Bench case, in which it has been held, that, before a plaintiff can succeed under the provisions of Clause 6 Section 23 Act X of 1859, he is bound to show that there is a subsisting relation of landlord and tenant between him and the defendant. But, on closer examination, it will be found that there is no real conflict between the two cases. Clause 6 referred expressly to suits brought by *tenants* for the recovery of lands. From which they had been illegally ejected by their landlords, and the Collector must, therefore, find that, the case before him is really the case of a tenant before he can assume any jurisdiction over it. This circumstance, however, cannot affect the validity of the position that the question of illegal ejection is the only question which is *directly* cognizable in such a suit. The Deputy Collector had full and ample jurisdiction to try whether there was a subsisting relation of landlord and tenant between the present plaintiffs and Bakir Ali, and yet it must be conceded that the determination of that question was merely incidental to the purposes of a suit which was essentially *a suit of a possessory character* as held by the first Full Bench decision. When the Legislature gives jurisdiction to a particular tribunal to try a particular class of suits, it would necessarily be competent to that tribunal to try all questions, whether of law or of fact, upon which the right determination of those suits may depend. But it would not, therefore, follow as a matter of course that the decision of every question determined by such a Court, in the course of such a suit, is to be considered as the decision of a question *directly raised* within the meaning of the proposition under our consideration.

Thus, for instance, in a suit for mesne profits, instituted, in the Small Cause Court, it might be sometimes necessary for that Court to enter into the most complicated questions of law and fact affecting the title to the land for which those mesne profits are claimed. But it would be obviously erroneous to contend that the decision of any of those questions by the Small Cause Court can be set up as a bar or as conclusive evidence in a subsequent litigation between the parties for the land itself, or that that decision is to be considered as a *direct* decision upon the question of title. Suppose, again, that the Revenue Court has decided in a suit for ar-

rears of rent valued at a few rupees, that the defendant has bound by a kubooleut to pay a certain amount of rent to the plaintiff for a certain number of years, and suppose, also, that the kubooleut is false, the defendant himself being the proprietor of the land to which it purports to relate, would the decision of the Revenue Court on the question of tenancy be considered such a direct decision upon the point of title as to operate as an estoppel in a subsequent suit brought by the defendant for the declaration of his right which would be admittedly a suit within the exclusive jurisdiction of the Civil Court? It would certainly be beyond the power of the Civil Court to give him any relief in the matter of the arrears already adjudged against him by the Revenue Court, for the Revenue Court had exclusive jurisdiction over that matter. But there would be nothing in the decision of the Revenue Court, upon the question of tenancy, to prevent the Civil Court from making a binding declaration that there was no relation of landlord and tenant between the parties, and thereby to save the supposed tenant from any further molestation by his opponent.

It is further worthy of remark that, however necessary it might have been for the Deputy Collector under the Full Bench decision just now cited to determine the question of tenancy before he could give to Bakir Ali the relief prayed for by him, no question relating to the precise nature and duration of Bakir Ali's holding could have been or was directly raised before the Deputy Collector for trial. Bakir Ali might have alleged and failed to prove that he was a mowroseedar, and yet the Deputy Collector would have been bound under the first Full Bench decision to restore him to possession, if he had shown that there was a subsisting relation of landlord and tenant between him and the present plaintiffs, and that the latter had ejected him contrary to law, say, for instance, by violating provisions of Section 78 of Act X of 1859, or by turning him out neck and crop in the middle of the year without any previous notice, or any other legal proceeding whatever. Can it be contended that the present plaintiffs could not have sued him in the next year in the Civil Court upon the ground that there was no longer any relation of landlord and tenant between them and him?

It has been said that the Deputy Collector's decision ought to be considered as final, at least with reference to the genuineness of the pottah in question. But this argument is manifestly untenable. The pottah is a mere matter of evidence, and it is beyond all question that a mere matter of evidence cannot be put in issue. A disputed state of facts might legitimately form the subject of an issue. But it would be just as much improper to put in issue the documents which the parties have filed in support of their respective allegations, as it would be to put in issue the veracity of the witnesses who are summoned to depose to those allegations. The evidence of a witness as to the existence of a particular state of facts is just as much a matter of evidence as a corresponding document; and I do not, therefore, think that we ought to make any distinction between them in framing the issues. The issue of tenancy was no doubt raised in the suit brought by Bakir Ali, and the mowrosee pottah might have been put in by him for the purpose of proving the affirmative of that issue. But the opinion of the Deputy Collector on the genuineness of the pottah can be no more treated as the decision of any issue directly raised upon the point than the opinion of that officer upon the veracity of the witnesses examined by Bakir Ali.

The foregoing remarks clearly show that the matter now in dispute between the parties was neither *directly* nor *completely* raised before the Deputy Collector in the former suit, and the case would, therefore, fall within the exception specified in the third proposition above referred to. This view seems to be fully supported by the remarks made by Mr. Taylor in Sections 1520 and 1521 of his work on evidence. I do not wish to quote those Sections in *extenso*, but I will simply refer to one of the cases mentioned by that learned author by way of illustration:—"In an action for debt on a bond, the defendant had pleaded that there was an usurious agreement between the plaintiff and himself, and that the bond was given in pursuance thereof, and issue having been joined on a traverse of this statement, the defendant had a verdict, the Court held that in a subsequent action on a collateral security for the same debt the plaintiff was not estopped by the former judgment from disproving the usurious agreement, inasmuch as the existence of such agreement had not been *directly* in issue in the action on the bond."

For the above reasons I am of opinion that the decision of the Lower Appellate Court ought to be reversed, and that this case should be remanded to that Court for the determination of the question, namely, whether the defendants are entitled to hold the lands in dispute as mukururedars under the plaintiffs, subject, however, to the result of the reference to the Full Bench made by my learned colleague, in which proposal I concur.

*The judgments of the Full Bench were delivered as follows by—*

*Couch, C. J.*—In 1866, one Bakir Ali brought a suit in a Revenue Court, under Clause 6, Section 23 of Act X of 1859, against the present plaintiffs, to recover possession of four beegahs of land, alleging that he held it under a mowrosee lease granted by the plaintiffs, and that they had dispossessed him by proceedings taken in the execution of a decree which they had recovered against his brother. The plaintiffs, in their answer, denied that he was their tenant, and said the mukururee pottah was a spurious document. The Deputy Collector held that it was genuine, and gave a decree to Bakir Ali for possession under it. This decision was confirmed by the Judge on appeal, and a special appeal from his decision was rejected by this Court. The defendants are the heirs of Bakir Ali, and the plaintiffs have brought the present suit to be restored to the possession of the lands of which the possession was so decreed to Bakir Ali.

The objection taken before the Subordinate Judge seems to have been that the suit was not maintainable, because the validity of the potta had been established in the former suit. He held that the suit was maintainable, but that the potta was a genuine one, and dismissed the suit with costs.

On appeal, the Judge has held that the decision in the former suit is conclusive in this suit, and that the plaintiffs cannot now contend that the potta is not genuine, and has dismissed the appeal without deciding whether it is genuine.

Thereupon the plaintiffs have preferred a special appeal to this Court, and the Division Bench, before which it came for hearing, has referred to a Full Bench the question "whether the previous decision as to the potta is or is not conclusive between the parties."

The case illustrates the defects of the present system of special appeal. There is a

very strong probability, to say the least, that if the Judge had determined the question whether the potta is genuine, he would have found it to be so; and that if this Court had power to decide the question of fact, it would find so; but the special appeal is brought for an error in law in holding that the previous decision is conclusive. The Division Court has been unable to come to a decision upon this question, and the Full Bench has to decide it. Under a better procedure, the case would be decided on its merits, and this question would most probably be an immaterial one. It must, however, now be answered.

The rule applicable to it is laid down in the *Duchess of Kingston's* case, first, that the judgment of a Court of concurrent jurisdiction, directly upon the point, is as a plea in bar, or as evidence, conclusive between the same parties upon the same matter directly in question in another Court; secondly, that the judgment of a Court of exclusive jurisdiction, directly upon the point, is in like manner conclusive upon the same matter between the same parties, coming incidentally in question in another Court for a different purpose. Mr. Justice Mitter, in his judgment in this case, after calling this an estoppel, says:—"The late learned Chief Justice of this Court seems to have thrown considerable doubts upon the propriety of introducing the doctrine of estoppel in this country in the judgment delivered by him in the case of *Mussamat Edun*, reported in page 175 of the 8th Weekly Reporter. That doctrine, it was observed, is one peculiar to the law of England. It is intimately connected with the English law of pleadings which has no existence in our Courts, and as its tenancy is to shut out the truth, it may well be doubted whether those Courts, which are by their very constitution Courts of equity and good conscience, would be justified in adopting a doctrine which has such a tendency." These remarks oblige me to quote from the judgment of the Judicial Committee in *Khagowlee Singh vs. Hossain Bux Khan*,\* 7 Bengal Law Reports, 673. After quoting the well known passage from the *Duchess of Kingston's* case, their Lordships say:—"There is nothing technical or peculiar to the law of England in the rule as so stated. It was recognized by the Civil law, and

"it is perfectly consistent with the second Section of the Code of Procedure under which this case was tried, which says ... .." I have carefully read the report of the case at page 175 of the 8th Weekly Reporter, and I have not found it anywhere stated that the doctrine "is one peculiar to the law of England." Upon the remark that it is intimately connected with the English law of pleadings (meaning I presume common-law pleadings), and that it may well be doubted whether our Courts would be justified in adopting it, I will only observe that the English Courts of Equity have adopted it, as may be seen in *Barrs vs. Jackson*, 1 Phillips, 582; 1 *Younge and Collyer*, C. C., 585. Vice-Chancellor Knight Bruce, in his judgment in this case, quotes various passages from the Civil law, showing the reason of the rule. That the judgment of a Court of competent jurisdiction upon a question directly raised before it shall be accepted between the parties to the suit as *truo* seems to me to be a rule which should be adopted in our Courts. Section 23 of Act X of 1859 gave jurisdiction to the Collectors in certain suits, and amongst them, by Clause 6, in all suits to recover the occupancy or possession of any land, farm or tenure, from which a ryot, farmer, or tenant has been illegally ejected by the person entitled to receive rent for the same. Mr. Woodroffe, who appeared for the appellants, relied upon the decision of a Full Bench in 7 Weekly Reporter, 186, and also argued that illegally ejected means ejected otherwise than by due form of law. In the Full Bench case, the Chief Justice delivering judgment said:—"We think that the words 'suits to recover the occupancy or possession of any land' in Clause 6, Section 23 of Act X of 1859 refer only to possessory actions against the person entitled to receive the rent, and not to suits in which the plaintiff sets out his title and seeks to have his right declared and possession given him in pursuance of that title." Bakir Ali's suit was to recover possession, and he alleged that he had been dispossessed by the plaintiffs by proceedings taken in execution of a decree against another person, which would be clearly illegal. I have no doubt that it was a suit within Clause 6 of Section 23; and as the plaintiff alleged that he held under a *mowrosee* lease, it was necessary for the Deputy Collector to determine whether the lease was

\* 15 W. R., P. C., 30.

## SCHEDULE V.

(See Section 2.)

## ENACTMENTS REPEALED.



Number and year.	Title.	Extent of Repeal.
Statute 58 Geo. 3, cap. 84.	An Act to remove doubts as to the validity of certain marriages had and solemnized within the British territories in India.	The whole.
Statute 14 & 15 Vic., cap. 40.	An Act for Marriages in India. ...	The whole.
Act No. V of 1852 ...	An Act for giving effect to the provisions of an Act of Parliament passed in the 15th year of the reign of Her present Majesty, intituled "An Act for Marriages in India."	So much as has not been repealed.
Act No. V of 1865 ...	The Indian Marriage Act, 1865. ...	The whole Act, except so far as it relates to the Straits Settlements.
Act No. XXII of 1866.	An Act to extend the Indian Marriage Act, 1865, to the Hyderabad Assigned Districts, and the Cantonments of Secunderabad, Trimungerry, and Aurungabad.	The whole.

WHITLEY STOKES,

Secy. to the Govt. of India.

## ACT. No. XVI.

(Received the assent of His Excellency the Governor-General on the 1st August 1872.)

*An Act for imposing a duty on certain spirits manufactured in British Burma.*

FOR the purpose of imposing a duty on spirits manufactured at distilleries in British Burma, worked according to the English method; It is hereby enacted as follows:—

Short title. 1. This Act may be called  
Act, 1872:—

Local extent. It extends only to British  
Burma:

Commencement. It shall come into force on  
the passing thereof;

Act to be read as part of Excise Act 1871. And it shall be taken  
as part of the Excise Act, 1871.

2. A duty shall be levied on spirits manufactured at distilleries in British Burma, worked according to the English method, at such rate per imperial gallon, of the strength of London-proof, not exceeding the highest rate of duty for the time being leviable in any other part of British India on similar spirits, as the Local Government, with the previous sanction of the Governor-General in Council, from time to time notifies in the local official *Gazette*.

The duty leviable under this section shall be augmented or reduced in proportion to the strength of the spirits on which it is levied.

3. The provisions of the second and third clauses of section twenty-one of the Excise Act, 1871, shall apply to such spirits, as if for the words "aforesaid duty," the words "duty leviable under the Burma Spirit Duty Act, 1872," were substituted.

4. All duties heretofore levied on such spirits shall be deemed to have been levied in accordance with law, and no suit or other proceeding shall be maintained against any officer or other person in respect of any such levy.

WHITLEY STOKES,  
Secy. to the Govt. of India.

## ACT No. XVII of 1872.

(Received the assent of the Governor-General on the 19th August 1872.)

*An Act for postponing the day on which the Code of Criminal Procedure is to come into force.*

WHEREAS the Code of Criminal Procedure (Act No. X of 1872), section one, enacts that the said Code shall come into force on the first day of September 1872: And whereas it is expedient to postpone the day on which such Code shall come into force; It is hereby enacted as follows:—

1. The said Act No. X of 1872 shall come into force, not on the first day of September 1872, but on the first day of January 1873.

Criminal Procedure Code to take effect on 1st January 1873.

WHITLEY STOKES,  
Secy. to the Govt. of India.

## ACT No. XVIII of 1872.

(Received the assent of the Governor-General on the 29th August 1872.)

*An Act to amend the Indian Evidence Act, 1872.*

WHEREAS it is expedient to amend the Indian Evidence Act, 1872; It is hereby enacted as follows:—

1. This Act may be called "The Indian Evidence Act Amendment Act;"

Short title.

Commencement.

And it shall come into force on the passing thereof.

2. In section thirty-two of the Indian Evidence Act, 1872, clauses

Amendment of Act 1 of 1872, Section 32, Clauses 5 and 6. (5) and (6), after the word "relationship," the words "by blood marriage, or adoption," shall be inserted.

3. In section forty-one of the same Act, lines seventeen, twenty and

Amendment of Section 41. twenty-three, after the word "judgment," the words "order or decree," shall be inserted.

4. In section forty-five of the same Act, line five, after the word

Amendment of Section 45. "art," the words "or in questions as to identity of handwriting," shall be inserted.

5. In section fifty-seven of the same Act paragraph (13) after the

Amendment of Section 57. word "road," the words "on land or at sea," shall be inserted.

6. In section sixty-six of the same Act, line five, after the word "is,"

Amendment of Section 66. the words "or to his attorney or pleader," shall be inserted.

7. In section ninety-one of the same Act, exception (2), for the words

Amendment of Section 91. "under the Indian Succession Act," the words "admitted to probate in British India," shall be substituted.

8. In section ninety-two of the Indian Evidence Act, 1872, proviso

Amendment of Section 92. (1), for the words "want of failure," the words "want of failure" shall be substituted.

9. In section one hundred and eight of the same Act, line one, for

Amendment of Section 108. the word "when" (1) the words "Provided that when" shall be substituted; and in the last line, for the word "on," the words "shifted to," shall be substituted.

10. In section one hundred and twenty-six of the same Act, line

Amendment of Sections 126 and 128. twenty-two, and in section one hundred and twenty-eight of the same Act, line six, after the word "barrister," the word "pleader," shall be inserted.

In section one hundred and twenty-six of the same Act, line fifteen, for the word "criminal," the word "illegal," shall be substituted.

11. In section one hundred and fifty-five of the same Act, paragraph

Amendment of Section 155. (2), for the word 'had' the word 'accepted,' shall be substituted.

12. Nothing in the Indian Evidence Act, 1872, shall be deemed to

Saving of Act XV of 1852, Section 12. affect Act No. XV of 1852 (to Amend the Law of Evidence), section twelve.

NOTE.—The edition of Act No. I of 1872 above referred to is that in royal octavo.

WHITLEY STOCKES,

*Secy. to the Govt. of India.*

## ACT No. XIX OF 1872.

*(Received the assent of the Governor-General on the 29th August 1872.)*

*An Act to amend the definition of 'Coin' contained in the Indian Penal Code.*

WHEREAS it is expedient to amend the definition of 'coin' contained in the Indian Penal Code, section two hundred and thirty; It is hereby enacted as follows:—

Preamble. 1. For the first paragraph of the said section the following shall be substituted:

"230. Coin is metal used for the time being as money, and stamped and issued by the authority of some State or Sovereign Power in order to be so used."

WHITLEY STOCKES,

*Secy. to the Govt. of India.*



## ACT No. XX.

(Received the assent of His Excellency the Governor-General on the 5th September 1872.)

### An Act to amend Act No. V of 1872.

WHEREAS it is expedient to amend Act No.

*Preamble.* V of 1872 (to remove doubts as to the Jurisdiction of the High Court of Bombay over the Province of Sind); It is hereby enacted as follows:—

*Sections added to Act V of 1872* 1. The said Act shall be construed as if the following sections were added thereto:—

*Saving of Act XXIV of 1867.* “2. Nothing herein contained shall be deemed to affect the Administrator-General's Act, 1867.

*Saving of probates and administrations.* “3 Nothing herein contained shall be deemed to invalidate the grant of any probate or letters of administration heretofore or hereafter made by the High Court of Judicature at Bombay, or to affect the rights, powers or duties of any executor or administrator under, or by virtue of, any such probate or letters.

*Saving of High Court's criminal jurisdiction over European British subjects.* “4. Nothing herein contained shall be deemed to affect the criminal jurisdiction of the said High Court so far as regards European British subjects of Her Majesty.”

WHITLEY STOKES,

Secy. to the Govt. of India.

## ACT No. XXI OF 1872.

(Received the assent of the Governor-General on the 5th September 1872.)

### An Act to facilitate the admission of Native Military Lunatics into Asylums.

*Preamble.* WHEREAS it is expedient to facilitate the admission of Native Military Lunatics into Asylums; It is hereby enacted as follows:—

*Short title.* 1. This Act may be called “The Native Military Lunatics' Act, 1872.

It extends to the whole of British India and, so far as regards subjects of Her Majesty, to the dominions of Native Princes and States in India in alliance with Her Majesty;

*Extent.* And it shall come into force on the passing thereof.

*Commencement.* 2. Whenever any Native officer, non-commissioned officer or soldier appears to be insane, the officer commanding the regiment or detachment to which he belongs shall report the case to the general officer commanding the division or district, or force in which such regiment or detachment is serving.

*Report of insanity of Native officer or soldier.* 3. Such general officer shall thereupon cause the said Native to be examined by a committee composed of at least two medical officers, or (if this be impracticable) by a regimental committee, comprising the officer in command of the wing or squadron to which the Native belongs, and the medical officer in charge of the corps or detachment of which such wing or squadron forms part.

*Examination of Native.* 4. If the said committee or regimental committee (as the case may be) are satisfied that the Native is insane, the officer commanding the division or district or force, may, if he thinks fit, make and order, under his hand, for the reception of the said Native into a Lunatic Asylum, and shall then send him thither under military escort;

*Order for reception in Asylum.* and the officer in charge of such Asylum shall receive the Native into the Asylum and detain him therein until he is discharged therefrom in accordance with the local military regulations in force for the time being.

*Reception and detention in Asylum.* 5. The pay-master of the military circle within which any such Asylum is situate shall pay to the officer in charge of such Asylum the expense of the lodging, maintenance, clothing and medicine of every Native so received and detained.

*Expenses of Lunatic.* 6. All Native officers, non-commissioned officers or soldiers heretofore received into Lunatic Asylums shall be deemed to have been so received in accordance with law.

WHITLEY STOKES,

Secy. to the Govt. of India.

## ACT No. XXII OF 1872.

PASSED BY THE GOVERNOR-GENERAL OF INDIA  
IN COUNCIL.

(Received the assent of His Excellency the  
Governor-General on the 13th September  
1872.)

### *An Act to explain and amend Act No. X of 1859.*

WHEREAS it has been the practice for the  
Preamble. Local Government or the  
Collectors of Districts to invest

persons not being Deputy Collectors  
with all or some of the powers of Deputy  
Collectors for the purposes of Acts No. X of  
1859 and No. XIV of 1863.

And whereas it has been the practice for  
all or some of the Deputy Collectors and of  
the persons invested as aforesaid to exercise  
the powers of Deputy Collectors in charge  
of sub-divisions of districts, or of Assistants  
to Collectors invested by Government with  
the powers of Deputy Collectors :

And whereas many suits have been pre-  
ferred and applications made to, and orders  
made and acts done by, such Deputy Collec-  
tors and other persons in the exercise of  
such powers :

And whereas doubts have been raised as  
to the legality of such practices and as to  
the jurisdiction to entertain such suits and  
applications, and to make and do such orders  
and acts ;

For the purpose of precluding such doubts,  
it is hereby enacted as follows :—

1. All Deputy Collectors and all persons  
heretofore or hereafter so in-  
vested with powers shall be  
deemed to have been or to  
be (as the case may be)  
Deputy Collectors in charge

of sub-divisions of districts within the mean-  
ing of the said Acts No. X of 1859 and  
No. XIV of 1863, or Assistants to Collectors  
invested with the powers of Deputy Collec-  
tors in such charge.

2. All such suits shall be deemed to have  
been and to be as duly pre-  
ferred, and all such applica-  
tions, orders and acts shall  
be deemed to have been and to be as duly  
made and done, as if the said Deputy Col-  
lectors and other persons had been Deputy  
Collectors in charge of sub-divisions of dis-  
tricts within the meaning of the said Acts  
No. X of 1859 and No. XIV of 1863.

And no order or Act heretofore or hereafter  
made or done as aforesaid by any such person  
shall be held invalid merely because the  
suit in which such order was made or Act  
done has not been preferred in the place  
prescribed by the said Act No. X of 1859,  
section one hundred and sixty-two.

3. The Local Government, or any officers  
empowered by the Local Gov-  
ernment on this behalf, may,  
from time to time, by order  
defined and as just the local  
areas over which the persons  
exercising the powers of  
Deputy Collectors in charge of sub-divisions  
of districts shall exercise their jurisdiction.

Such local areas shall be deemed to be  
sub-divisions of districts within the mean-  
ing of the said Act No. X of 1859.

4. In this Act and Acts Nos. X of 1859  
and XIV of 1863, "Collec-  
tor" includes also a Deputy  
Commissioner and every per-  
son in the chief revenue charge of any dis-  
trict.

5. This Act may be called "The Act  
X of 1859 Amendment Act,  
1872."

It extends only to the territories respec-  
tively under the government  
of the Lieutenant-Governor  
of the North-Western Provinces and under  
the administration of the Chief Commissioner  
of the Central Provinces ;

And it shall come into  
force on the passing thereof.

## ACT No. XXIII of 1872.

PASSED BY THE GOVERNOR-GENERAL OF INDIA IN COUNCIL.

(Received the assent of His Excellency the Governor-General on the 25th September 1872.)

*An Act for regulating the re-importation into British territory of goods cleared at Rangoon for the territory of the King of Ava.*

WHEREAS it is expedient to provide for the re-importation into British territory of goods cleared at Rangoon for the territory of the King of Ava, under the provision of Act IV of 1863 (to give effect to certain provisions of a treaty between His Excellency the Earl of Elgin and Kincardine, Viceroy and Governor-General of India, and His Majesty the King of Burmah); It is hereby enacted as follows:—

1. In this Act,—

“Political Agent” denotes any officer appointed by the Governor-General in Council to reside as representative of the British Government at Mandalay, Bhámu, or any other town within the territories of the King of Ava;

and “Master” includes any person in charge of a Native boat.

2. Whoever desires to re-import into British territory goods previously exported from Rangoon to the territories of the King of Ava, must obtain from the Political Agent a certificate in the form set forth in the schedule hereto annexed.

Such certificate shall be made out in duplicate: the original shall be handed to the owner or shipper of the goods, and the duplicate shall be forwarded to the Master of the vessel in which the goods are intended to be shipped.

3. All goods protected by such certificate shall be delivered, by the Master of the vessel in which they are shipped, to the Collector of Customs at Thayetmyo, or Rangoon, or at any other station in British territory on the Irrawaddy, as may be directed in the certificate aforesaid;

and such Collector shall retain the goods until the difference between the duty of one per centum *ad valorem*, and the duty which they would have been liable to pay if cleared

for home consumption when originally imported by sea, is paid to him, together with any incidental expenses incurred in removing and storing the same.

4. Should no application regarding the said goods be made to the Collector within one week after they have come into his possession, he shall cause an advertisement to be inserted in the local *Gazette*, notifying that if the said goods are not cleared within one month from the date of such notice, they will be sold and the proceeds applied, in the first place, to pay all expenses of the sale, and then all dues and charges owing to Government in respect of the said goods.

The surplus (if any) shall be held to the credit of the owner of the said goods.

5. Any Master of a vessel failing to deliver to the Collector, as provided in section three, any goods protected by a Political Agent's certificate, shall be liable to a penalty not exceeding one thousand rupees.

Such penalty shall be adjudged after a summary proceeding by any Collector of Customs; but his adjudication shall be subject to appeal to the Commissioner of the Division.

6. Any goods cleared for exportation under the said Act for the King of Ava's territory, found within British territory and not protected by a certificate as required by section two, shall be considered contraband and shall be liable to seizure by an officer of customs, or an officer of police, and to confiscation by any Collector of Customs to whom the goods may be delivered, unless it be proved that the full duty leviable on goods cleared for home consumption has been paid on the said goods.

Nothing in this section affects—

(a) goods in transit from the Custom House at Rangoon to the vessel on which they are to be laden for export,

(b) goods found on board of any vessel on her passage from Rangoon to the King of Ava's territory, and cleared for export under the said Act.

7. This Act shall be read as part of the said Act No. IV of 1863.

*Procedure on goods not being cleared.*

*Penalty on failing to deliver to Collector goods protected by certificate.*

*Exported goods found in British territory, unprotected by certificate, to be deemed contraband.*

*Saving of certain goods.*

*Construction.*

## SCHEDULE.

(See Section 2.)

## Certificate.

Mr. } \_\_\_\_\_ having declared <sup>his or</sup> <sub>their</sub>  
 or }  
 Messrs. }

intention to re-export from \_\_\_\_\_ to  
 the undermentioned goods, originally cleared  
 at Rangoon under Act IV of 1863, I grant  
 permission for the said goods to be shipped  
 on board the <sup>steamer</sup> <sub>ship</sub> \_\_\_\_\_, and request  
 that the Master will deliver the said goods  
 to the Collector of Customs at \_\_\_\_\_

Marks and numbers.	Description of packages.	Number of packages.	Contents of each package.	When imported into.

(Sd.) A. B.,

Political Agent at \_\_\_\_\_

## ACT No. XXIV OF 1872.

PASSED BY THE GOVERNOR-GENERAL OF  
INDIA IN COUNCIL.

(Received the assent of His Excellency the  
Governor-General on the 25th September  
1872.)

An Act to repeal Bombay Regulation XIII of  
1827, section thirty-four, clause nine.

WHEREAS it is expedient to render the  
Preamble. practice relating to the pay-  
ment of subsistence allow-  
ances to witnesses in the Courts of Subordi-  
nate Magistrates uniform throughout British  
India: And whereas it is necessary, for that  
purpose, to repeal Bombay Regulation XIII  
of 1827 to the extent hereinafter mentioned;  
It is hereby enacted as follows:—

1. Bombay Regulation XIII of 1827  
(for defining the Constitution  
of Courts of Criminal Jus-  
tice, and the Functions and  
Proceedings thereof), section  
thirty-four, clause nine, is repealed.

## ACT No. XXV OF 1872.

PASSED BY THE GOVERNOR-GENERAL OF  
INDIA IN COUNCIL.

(Received the assent of His Excellency the  
Governor-General on the 12th October  
1872.)

An Act to give the force of law to certain  
Rules relating to Salt in the Punjab.

WHEREAS certain Rules for the realization  
and protection of the revenue  
derived from the Salt Mines  
in the Sind Sagar Doab and at Kalabaugh,  
prepared by the late Board of Administra-  
tion for the Affairs of the Punjab, were on  
the twenty-ninth day of May 1851, approved  
by the Governor-General, and, under the  
Indian Councils' Act, 1861, received the  
force of law: And whereas the said Rules were  
repealed by the Punjab Laws' Act, 1872, and  
such repeal took effect on the first day of  
June 1872: And whereas it is expedient,  
pending the passage of an Act to consolidate  
and amend the law relating to Inland Cus-  
toms, to revive and continue such Rules with  
the modifications hereinafter mentioned; It  
is hereby enacted as follows:—

1. The said Rules shall have, and shall,  
from the said first day of  
June 1872, be deemed to have  
had, the force of the law,  
subject to the following modifications (that  
is to say):

(a) In Rule 2, for the figure and words  
“(2) two rupees,” the words “three rupees  
one anna” shall be substituted;

(b) In Rule 3, after the word “Panjáb,”  
the words “that may from time to time be  
determined by the Local Government” shall  
be inserted;

(c) In Rule 8, for the words “the Jhe-  
lum Division,” the words “Commissioner of  
Inland Customs” shall be substituted;

(d.) In Rule 17, for the words "Boards of Administration," the words "Lieutenant-Governor of Punjab" shall be substituted;

(e.) In Rule 21, for the last twenty words, the following words shall be substituted (that is to say): "elementary salt illegally manufactured or imported;"

(f.) To Rule 22, the following words shall be added (that is to say): "and may from time to time be altered by like notification;"

(g.) In Rule 24, for the last twenty-eight words, the words "Inland Customs" shall be substituted;

(h.) In Rules 26, for the words "in charge of the Preventive Line," the words "of the Division" shall be substituted; and for the words "salt is not the produce of the Sind Sagar or Kalabaugh Mines," the words "possession of the salt is prohibited by paragraph 21" shall be substituted;

(i.) In Rule 30, for the words "but that obtained from the Sind Sagar Mines or from Kalabaugh," the words "the possession of which is prohibited by paragraph 21" shall be substituted;

## ACT No. XXVI OF 1872.

PASSED BY THE GOVERNOR-GENERAL OF  
INDIA IN COUNCIL.

(Received the assent of His Excellency the Governor General on the 12th October 1872.)

An Act to amend the Law relating to Opium in the Punjab.

WHEREAS it is expedient to amend the law relating to opium in the Punjab; It is hereby enacted as

Preamble.

follows:—

1. This Act may be called "The Punjab Opium Law Amendment Act, 1872."

Short title.

It extends only to the territories under the government of the Lieutenant-Governor of the Punjab;

Local extent.

And it shall come into force on the 1st day of January 1873.

Commencement.

2. In this Act and in the Punjab Laws' Act, 1872, "opium" includes also poppy-heads and all intoxication drugs prepared from the poppy.

"Opium" defined.

3. Whenever in the said territories an acreage duty is for the time being liable on the cultivation of the poppy, sections 15, 16, 62, 65, and 66, of the Exercise Act, 1871, shall have no effect, so far as they restrict, directly or indirectly, the sale of opium grown within the said territories, or prohibit the possession or sale of such opium by persons other than licensed vendors.

Modification in certain districts of Act X of 1871, sections 15, 16, 62, 65, and 66.

4. In prosecutions under the said sections respectively, it shall be assumed, until the contrary is proved, that the opium in respect of which an offence is alleged to have been committed, has been grown without the said territories.

Burden of proof in prosecutions.

5. Whenever any rule made by the Local Government under the Punjab Laws' Act, 1872, and relating to the growth, sale or possession of opium, is broken, the opium in respect of which the breach is committed shall be liable to confiscation.

Confiscation of opium.

## ACT No. XXVII OF 1872.

PASSED BY THE GOVERNOR-GENERAL OF INDIA  
IN COUNCIL.

(Received the assent of His Excellency the Governor-General on the 31st December 1872.)

An Act for postponing the day on which the Code of Criminal Procedure is to come into force in the Province of Sindh.

WHEREAS Act No. XVII of 1872 provides that the Code of Criminal Procedure (Act No. X of 1872) shall come into force throughout British India on the first day of January 1873:

And whereas the translation of the said Code into the Sindhi language has not been completed, and it is therefore expedient to postpone the day on which the said Code shall come into force in the Province of Sindh; It is hereby enacted as follows:—

I. In the Province of Sindh the said Code shall come into force, not on the first day of January 1873, but on the first day of April 1873.

Commencement of Code of Criminal Procedure in Sindh.

genuine. I must here observe that concurrent jurisdiction in my opinion refers to the matter decided upon, and it is not necessary, as Mr. Justice Mitter seems to think, that the Court whose judgment is to be conclusive should have been able to entertain the suit in which it is to be used. If it were so, a person who had sued another in the Small Cause Court of Calcutta for a debt, and obtained a judgment, could not use it in a suit in the High Court against the same person as proof that the latter was indebted to him, if the suit in the High Court was of such a nature as not to be cognizable by the Small Cause Court.

It appears to me that the question referred to us must be determined by considering what the point, upon which the judgment in the suit before the Deputy Collector was given, was. The suit was to recover possession of land from which a tenant had been illegally ejected. The Deputy Collector had to determine two questions: Was the plaintiff a tenant of the land? Had he been illegally ejected by the person entitled to receive rent for it? To determine the first of these, it was necessary for him to find whether the alleged lease was genuine; but the real judgment in the suit was that the plaintiff was a tenant, the pottah being the proof of it. The Deputy Collector had no jurisdiction to give effect to the pottah as a permanent title; he could only use it as showing that at that time the plaintiff had a right to the possession of the land. It was laid down by Lord Ellenborough in *Outram vs. Moorwood*, 3 East, 357, that a judgment is final only for its own proper purpose and object and no other. The suit now before the Court is against the heirs of Bakir Ali, whose case is that he had a mowrosee pottah; but the Deputy Collector had not power in the suit before him to adjudge that the tenancy was hereditary; and if his judgment is to be taken as being directly on that point, his is not a Court of concurrent jurisdiction. His finding upon the pottah, except so far as it is established the right of Bakir Ali to the possession of the land when he was ejected, must be considered a finding upon a collateral matter.

In my opinion, therefore, the question referred ought to be answered in the negative.

*Jackson, J.*—I desire only to say that I do not dissent from the conclusion arrived at in the judgment which has just been deli-

vered. The inclination of my own mind has been, as the observations which I made in referring the case would show, in the other direction, and I confess that I have not yet felt sufficiently confirmed in the opinion which is now that of the majority of the Court to state it in language of express assent.

*Phear, J.*—This case is so nearly parallel with that which is reported in the 8 Weekly Reporter, page 175, that the reasons which I then gave for my judgment would, by the substitution of the word pottah for bond, serve to explain, almost precisely, the view which I take on the present occasion.

The cause of action upon which the present plaintiffs sue is that the defendants are wrongfully in possession of the plaintiffs' land, and are wrongfully withholding it from them. The answer of the defendants is that they are holding the land under a pottah which is mowrosee in its terms, and was granted to them by the plaintiffs. Thereupon, the plaintiffs wholly deny the genuineness of the alleged pottah, and require that an issue on this point be raised and tried between them and the defendants. The defendants maintain that this cannot be done, because an issue as to the genuineness of this very document was raised between them and the present plaintiffs in a former suit which was brought in a Court competent to decide the issue, and that it was then determined against the present plaintiffs. It is admitted by the plaintiffs that this was so, and the question before us is whether or not in view of the former determination of the issue the same issue can now be raised and tried a second time between the same parties.

It appears that the former suit, which is referred to, was a suit in the Collector's Court, wherein the relative situation of the parties was reversed: the ancestor of the present defendants, namely, Bakir Ali, sued the present plaintiffs, the Munduls, alleging that he was entitled to possession of the land (which is now the subject of suit) as their tenant under the pottah now in question, and that they had illegally ejected him; on this ground he sought the aid of the Collector to restore him to possession. The Mundles denied the genuineness of the pottah: the question thus raised, whether or not the pottah was genuine, was decided against them, and the Collector gave Bakir Ali possession.

Now, it must be observed at the outset that the Collector's Court was a Court of limited jurisdiction, and that it had no power to determine between the parties a question of right to the land larger than the bare *right to possession*. It so happened that the plaintiff's right to possession as he alleged it was clothed with mowrosee incidents, but the Collector's Court had no authority to determine whether such incidents existed or not; and indeed it is for this very reason that the Munduls are undoubtedly entitled, notwithstanding the Collector's decision against them in the former suit to come into the Civil Court to have the question as to the mowrosee right tried in the present suit. If they are here to be successfully met with the objection that the Collector has already finally determined the question of the validity of the pottah, then it is obvious the result is that the Collector has indirectly, if not directly, determined a question between the parties, which was beyond his powers, and has in effect ousted the Court of superior jurisdiction, for the latter will have nothing left to it, but to, in effect, register the Collector's decision. This clearly cannot be right. And the explanation is to my mind furnished by the discussion of the matter, which I offered in *Mussamut Edun's* case. I will not now go over the same ground again. I will simply confine myself to saying very shortly that I think the decision of the Collector upon the issue which is now before the Court, although he was unquestionably competent to try that issue for the purposes of the suit before him, did not effect a *res ad judicata* between the parties for all other purposes, and this for both the reasons given by Sir W. De-Grey in the *Duchess of Kingston's* case: first, the Collector had not concurrent jurisdiction with the Civil Court to the full extent of the matter involved in that issue; second, the issue as to the execution and authenticity of the pottah was a question of evidence collateral to the matter which the Collector had to determine.

I will add that, while it is no doubt most important in this country as in every other to give as much finality as possible to judicial determination of matters of dispute between parties, it is especially necessary in view of the inefficiency very generally displayed by our Indian Courts in the investigation and ascertainment of facts, that we should be watchful not to shut out a litigant without

good reason from an opportunity of showing the truth of his case.

I think the question put to us should be answered in the negative.

*Markby, J.*—In this case, I also would answer the question put in the negative. But I base my opinion entirely upon the peculiar character of the Court in which the former suit was tried. It was a Court the jurisdiction of which is defined by Section 23 of Act X of 1859. In some of the suits enumerated in that Section, it is obvious that questions of title must sometimes arise; and it also appears from Section 103 that the Legislature contemplated that these questions would arise, and made special provisions, in case they should arise, that an appeal should lie to the ordinary Civil Court. It might, therefore, have been thought that the Legislature considered that questions of title could be finally adjudicated upon by suits instituted in these Courts. But the Privy Council have held in the case of *Khoogowlee Singh vs. Hossein Bux Khan*, 7 B. L. R., 679, that the decision of a Collector in such a Court upon a question of title in a suit brought under Clause 2 of Section 23 of Act X of 1859, is not a decision of a Court competent to adjudicate on a question of title. It is true that this is only one of the reasons given for not treating the Collector's decision as conclusive in that case. It is true also that the suit which the Collector had tried in that case was for rent under Section 2, whereas this was to recover possession under Clause 6. But the expression of opinion as to the competency of the Collector is clear and distinct, and is in accordance with opinions of high authority which have been expressed in this Court as is shown in the judgment of Mr. Justice Mitter. Nor is it possible to say that the Court which is incompetent to adjudicate upon questions of title in a suit for rent is competent to do so in a suit for possession. The ground of incompetency of these Courts, as pointed out by the Privy Council, is the special and summary character of their jurisdiction.

Upon these grounds, I answer the question put in the negative.

*Ainslie, J.*—I concur in the judgment delivered by the Chief Justice.

THE 6TH MARCH 1873.

*Present :*

The Hon'ble LOUIS S. JACKSON and }  
 „ DWARKANATH MITTER... } *Judges.*

CASE No. 361 OF 1872.

*Special Appeal from a decision passed by the Officiating Subordinate Judge of Chittagong, dated the 29th November 1871, affirming on review his former Judgment, dated the 4th July 1871, affirming a decree of the Moonsiff of Seetacoond, dated the 30th November 1870.*

Sheikh Kulummoodeen Daroga,  
 plaintiff, ... .. *Appellant,*

*versus*

Nabab Alee and another, de-  
 fendants ... .. *Respondents.*

*For Appellant.*—Baboos Hurry Mohun  
 Chuckerbutty and Aukhil  
 Chunder Sen.

*For Respondent.*—Mr. H. E. Mendies.

The sale certificate having declared the sale of the rights of a particular party in the land of which the identity, is not in dispute, the mere circumstance of the right thus transferred is called by mistake by one name instead of by another, nearly importing the same thing does not constitute a difficulty in the way of giving the purchaser possession of the land specially where the land is further identified by the mention in the sale certificate of the jumrah at which the judgment-debtor's right whether talookee or otherwise is really held.

Plaintiff brought this suit for possession of eight gundas of land as forming a part of two kanees seven gundas of land which he had purchased at a public sale in execution of a Civil Court decree against the defendants. The sale certificate amongst other things, stated this:—"Plaintiff purchased the *jotedakhali* right of Basarat Ali and Amiroddin Khan over two kanees and seven gundas of land bearing four rupees eleven annas rent, and covered by the decision of the Principal Sudder Ameen, Moniroddin Khan Bahadoor, dated the 18th May 1858. \* \* \* The right title and interest of the debtors (defendants) in this land, are hereby transferred to the decree-holder purchaser." The plaintiff alleged that he had obtained possession of his purchased land excepting the disputed piece, of which the defendants have retained possession by erecting a hut upon it.

The defendants amongst other pleas, alleged in the 2nd para. of their written state-

ment, that the disputed land is, in fact, the land of their shikmee Talook, named Amiroddin Khan, that it was purchased by (their ancestor) Barasat Ali, and that they were holding it by inheritance under a *shikmi-taluka* right. And in the 4th para. of the written statement, the defendants contended that the Fysala alluded to by the plaintiff, confirmed their (defendants') *shikmi, Taluka* right over the disputed land, that they had no *jotedari* right over the same, and as the plaintiff had purchased a *jotedakhali* right, he could not get anything under the purchase.

The Moonsiff dismissed the suit holding that it did not appear that Amiroddin had any *jotedari* right; that he had a *taluk*, and that the decision of the Principal Sudder Ameen of the 18th May 1858 alluded to in the sale certificate, if properly construed, showed that Amiroddin had a *shikmi* Taluk, that as the plaintiff had purchased a *jote dakhali* right over the disputed land, which was not in existence, he could not obtain the land in suit.

On appeal by the plaintiff, Babu Bidhu Bhusan Banerjee, Officiating Sub-Judge of Chittagong, recorded the following judgment:—

"This suit was instituted to recover possession of eight gundas of land from out of two kanees and seven gundas purchased by plaintiff, in an execution sale. Defendant contends that the land is his taluk interest, and not the *jote* which has been sold and purchased by plaintiff. The Moonsiff has dismissed the suit.

"The point preferred in appeal is that whatever interest the debtor possessed has been sold including the disputed land.

"I think the ground of appeal is not weighty when it appears that the *ex-parte* decree for rent is not a material document for plaintiff; the sale certificate does not specify the particular land in dispute, nor do the measurement papers clear the matter. Hence I am of opinion that there is no reason to interfere with the conclusion of the Lower Court.

*Ordered*

"The appeal be dismissed, &c., &c."

Baboo Huri Mohun Chuckerbutty, on behalf of the plaintiff, special appellant, read out the 2nd and 4th paras. of the written statement and the decision of the Moonsiff, and argued that there was no dispute as to



the identity of the land, namely, that the land in suit was a part of what had been purchased by the plaintiff; that the Moonsiff's decision was a little too strained in holding that the judgment of the Principal Sudder Ameen established a *shikmi Taluka* right and not a *jotedakhali* right. That by whatever name the tenure may have been described, the plaintiff has obtained the whole right, title and interest of the defendants therein, whether it was a *jote* or *shikmi-taluk* ( *Vide* William B. Manson *vs.* Golam Kebria Moonshi, 15, W. R., p. 492.)

Mr. H. E. Mendies, for the special respondents, contended that the plaintiff having purchased a *jotedakhali* right which was not in existence, could get nothing, that debtors might be injured and prejudiced by putting up for sale a mere *jote* right, while in reality it was a higher and better title, namely, a *shikmi Taluka* right.

Baboo Huri Mohun Chuckerbutty was not heard in reply.

Louis S. Jackson, J.—(Mitter J. Concurring.)

The dispute in this case was as to what precisely the plaintiff had purchased at a sale in execution. The plaintiff sued to get possession of eight gundahs of land being as I understand only a small part of the lands which whether correctly or incorrectly described, were sold in that execution proceeding. In the sale certificate that which is sold, is described as being a *jotedakhilee* right established by the judgment-debtor under a decree of the Principal Sudder Ameen of a certain date.

The Moonsiff seems to have been at some pains to discover what was the precise nature of the right of the judgment-debtor which was sold, and he came to the conclusion that it was a *Shikmee talooka* right, and then because the interest sold was described as a *jotedaree* right, he concluded that the judgment-debtor's *Shikmee Talooka* right did not pass by the sale. This was objected to in appeal and the Subordinate Judge holds that the grounds of appeal is not weighty.

We have been referred to a decision of a Division Bench of this Court reported at page 490, Weekly Reporter, Vol. 15, in the case of William Bruce Manson against Golam Kebria Moonshi, in which one of the learned judges observes:—"I think that "in looking to the sale certificate, we must "not merely look to the words of it, but we

"must endeavour to ascertain what was "intended to be sold, a mere misdescription, "would not defeat the purchaser's right." I should hesitate in assenting expressly to the doctrine there laid down, because the adoption of it might lead to dangerous consequences, but in the present instance it appears to me that the sale certificate having declared, the sale of the rights of a particular party in the land, of which the identity is not a matter in dispute, the mere circumstance that the right thus transferred is called by mistake *jotedakhilee* instead of by some other term nearly importing the same thing, does not constitute a difficulty in the way of giving the purchaser possession of the land. The land I am told is further identified by the mention in the sale certificate of the jummah at which the judgment-debtor's right whether talookee or otherwise is really held. This is more specially so as we find that the dispute merely relates to a small portion of the lands sold, the question being really whether that small portion was comprised within those lands or not. That being so, I think the judgment of the Lower Appellate Court affirming that of the Moonsiff must be reversed, and the plaintiff's suit decreed with costs.

THE 24TH MARCH, 1873.

Present :

The Hon'ble J. B. PHEAR and } Judges.  
" " W. AINSLIE,

CASE No. 640 OF 1872.

*Special Appeal from an order passed by the Judge of Tirhoot dated the 20th December 1871, affirming the decree of the Moonsiff of Tajpore dated the 29th July 1871.*

Sookram Misser, Defendant ... Appellant,  
versus

Mr. W. Crowdy, General Agent  
of Mr. Charles Alexander,  
Malik of the Indigo Factory  
of Mouzah Athur Hurbuns  
Pergunnah Burael, Plaintiff, Respondent.

For Appellant.—Baboo Doorga Dass Dutt.

For Respondent.—Baboo Umbica Churn Banerjee.

When a plaintiff sues for a certain share of the rent which is alleged to be due to him, and the defendant's objection is that the plaintiff's share in the state is less than what is claimed, it lies on the plaintiff in such a suit in support of the allegations which he made relative to his cause of action to prove the extent of his share unless the defendant admits it to be that which the plaintiff alleges.

*Mr. Justice Phear.*—It was no doubt a melancholy task for a Court which had to judge of facts to be called upon to come to a determination of fact upon such material as this record is made up of. But still I think that the judgment of the Lower Appellate Court might certainly have been more perspicuous than it is. As far as I understand the case the plaintiff claims under a Ticca pottah granted to him by 5 or 6 out of several shareholders, the share of the rent which is said to be due to him from the defendant, another shareholder, in respect of the occupation of a certain quantity of the zeraet land which constitutes the holding of the combined share-holders.

The first objection that the defendant makes is that the plaintiff's share in the estate is less than what he states it to be, and the Judge says—"With regard to the first objection which contends that the plaintiff's share is less than he states it to be, I have only to say that the defendant has failed to show what plaintiff's share really was or how it is less than the plaintiff makes it out to be."

This seems to be a somewhat strange mode of approaching the questions, because apparently the burden of proving the affirmative of this question lay upon the plaintiff. I see nothing in the case which should induce me to think that the burden of disproving the plaintiff's allegation lay on the defendant rather than that the burden of proving the affirmative of it lay on the plaintiff.

The Judge goes on to say,—"the defendant had full opportunity to prove this, and he should have done so as the matter of proofs lay with him (though it may be said it lay with the plaintiff)" I confess that I have been quite unable to understand this passage. Then the Judge says,—"seeing that his statement was not of such character as to throw the onus of proof on the plaintiff with reference to Act X of 1859, he had no right to dispute the share, for under Section 77 of that Act only an intervenor who had been injured could object, a ryot having no right to do so."

It appears to me that the Judge must have been under some misapprehension even

as to what the case would have been if the proceedings had been taken under the provisions of Act X of 1859. A ryot who in such a case as this is resisting the claim of a share-holder to rent, is, I apprehend, entitled, if has good reason to do so, to make the plaintiff prove that which he alleges is the amount of his share. Of course if the plaintiff comes into Court with any evidence which amounts to an admission on the part of the ryot of the extent of his share, there is an end of the matter on his side and the onus is shifted. The Judge remarks,—"In such cases the onus would lie on the intervenor." In such cases, however, I apprehend the onus which would lie upon the intervenor, would be merely the onus of proving that he was in *bond fide* possession. He would in truth have nothing to do with the question as to the amount of the plaintiff's share except so far as it might be involved in the question as to possession and enjoyment.

The judge then goes on to say,—"As Section 77 has been omitted in Act VIII of 1869, it is difficult now for a ryot to object, but it would be unfair not to give him a fair chance—I have therefore allowed him to object placing him in the position of an intervenor making the onus of proof rest on him."

We thus come, it seems, to the reason which induced the Judge of the Lower Appellate Court to think that the burden of proving the affirmative of the plaintiff's case lay upon the defendant. I am bound to say that I think his reasoning is insufficient. It appears to me distinctly that it lay upon the plaintiff in this suit, in support of the allegations which he made relative to his cause of action, to prove the extent of his share, unless the defendant admitted it to be that which he the plaintiff alleged; but as I have already said, the first objection which the defendant made was an objection to the correctness of this allegation.

The Lower Appellate Court next deals with the evidence of the defendant bearing upon this point. It says,—"He has only cited two witnesses who merely state that plaintiff holds a 7 annas 3 gundahs share in Ticca belonging to Shiboo Misser; they do not say how they obtained this information which is moreover far too general. He failed to cite any other share-holders as a witness, nor did he call for any Jumma-bundees from them or prove by the evidence

of ryots that the plaintiff only collected rents for a 7 annas 3 gundahs share. Under these circumstances I consider that on that point defendant has failed to substantiate the objections urged.

"Next, with regard to plaintiff's proof, I would observe that he files a Moonsiff's decision, dated 6th June 1868 (alluded to above) to prove his possession of a 9 annas 9 gundahs share.

"On appeal against that order defendant omitted to raise any objection against the share; his Vakeel too urged that that decision had been reversed and that it should not be accepted as proof." It was the fact that this decision was reversed; but it was not merely reversed, it was set aside as having been the decision of a Court not having jurisdiction to entertain and determine the matter in the suit. The Judge proceeds,— "I cannot consider that decision as *full* proof though it may be of use to the plaintiff, for the defendant by his silence on that point acknowledges its correctness."

A decision, which is no decision at all, which has been set aside by a superior Court on the ground that it was passed without jurisdiction, cannot be considered to have any probative force whatever between the parties. It is true that silence on the part of a defendant during the trial of a case in regard to any matter brought against him in the course of the case might possibly be of some value afterwards irrespective of the decree as amounting to an admission on his part that that which was alleged and with regard to which he had kept silence was true. But I need hardly say that this is a very different thing from the issue which the Judge makes of the decree itself. The Judge goes on to say:—

"Besides this the plaintiff has cited a Patwaree and several witnesses to prove that he has collected rents for the share which he states he holds."

That must mean if it means any thing that he had collected rents in respect of the same share from other ryots, for it is admitted on this case that no rents have been collected by the plaintiff from the present defendant at any time.

Then the Judge says:—"I find there is a decision of the Zillah Judge dated 7th June 1870, in a case brought against another defendant holding a similar share. That suit being exactly like the one under consideration helps to assist the plaintiff, for the

plaintiff in that case got a decree in accordance with the share he stated. It may be urged that the defendant being no party to that suit is not bound by it—no more he is. I merely say that it is unnecessary for a malik to prove his share before every ryot—that fact being once proved is enough and will always stand good in suit against any of his ryots. This decides his share to be what it is."

So that it seems that the Judge after stating very correctly that the defendant was not bound by that decision he having been no party to it, goes on to determine the case upon the ground that he was bound by it, because the Malik having once established his share in a former suit against another person is not obliged to establish the same against every one of his ryots, it stands good against any of his ryots including therefore the present defendant. And the Judge concludes:—"And the defendant's objections are worthless and merely urged to to bar some of the years for which rent is claimed."

It is quite clear without any further discussion that the Judge has committed error in passing to his conclusion in the way in which he has done, namely his conclusion that the issue relative to the amount of the plaintiff's share was made out as between the plaintiff and the defendant in the way which he traced out. No part of the material to which the Judge refers, whether afforded on the side of the plaintiff or on the side of the defendant, appears to me in the slightest degree to make out the allegations of the plaintiff on this head.

It has been urged before us by the learned pleader who has appeared on behalf of the respondent that, even if the Judge's decision cannot be upheld upon the face of his judgment, still there is evidence on the record which is sufficient to support it, and that, if that is so we ought not here in special appeal to disturb it. In view of this argument we have had considerable part of the testimony of the witnesses in the Court below read to us. So far as we can understand that evidence, now if it goes the length which is necessary in order to prove the plaintiff's case in this particular, and I may add that it seems to me that the plaintiff has not set out on the right road to obtain success of any sort in this litigation, the evidence on the record appears to disclose a somewhat complicated relation

as to occupation and liability to pay rent between the plaintiff (or rather his assignors) and the other shareholders. Even if he had succeeded in showing, as he does not seem to have done, what is the extent of the share which he has received out of his assignor's share in the entire holding, and he has failed utterly in showing, in truth he has hardly made any effort to shew, how much land the defendant is occupying in excess of his proper share for which excess land alone he would be liable to pay rent to his co-sharers. It would seem that there was some recognized amount which each co-sharer was entitled, in proportion to his share, to occupy without payment of rent, and so he would only be liable to pay rent at all when he occupied in excess of that quantity; and further he would of course be only liable to pay any given shareholder in actual money the difference between that which he was liable to pay and that which he was entitled to receive. None of these matters seems to have been enquired into at all in the Court below, and I hardly see how they could have been enquired into in a suit which has been brought in the shape which this suit bears. It would seem to be almost necessary that *all* the parties concerned should have been brought before the Court in *one* suit before their respective equities interse could be determined.

I have made these remarks with regard to the character of the plaintiff's claim and the circumstances under which the suit is brought, in order to show that in my judgment the failure of the plaintiff to prove the particular share which he had obtained in the property was merely the first failure in a series of steps which he must take before he can make out that he is entitled to receive rent from the defendant and for which he has made no preparation whatever.

This being so, it seems to me that there is no other course open to us than to reverse the decision of the Court below; and that while reversing the decision of the Court below, we must also dismiss the plaintiff's suit with costs in all the Courts. It is useless to send back the case for any further proceedings to be taken.

THE 27TH MARCH 1873.

Present:

The Hon'ble LOUIS S. JACKSON, }  
" " DWARKANATH MITTER } Judges.

CASE No. 235 OF 1870.

*Miscellaneous Regular Appeal from an order passed by the Officiating Judge of Hooghly, dated the 14th April 1870.*

Poorno Chunder Mookerjee and  
others, decreeholders, ... Appellants,

versus

Shekhur Chunder Roy and others,  
judgment-debtors, ... Respondents.

*For Appellants.*—Mr. Montriau, Baboos  
Romesch Chunder  
Mitter and Anund  
Chunder Ghosal.

*For Respondents.*—Mr. Money and Baboo  
Taruck Nath Sein.

When notices are served on judgment-debtors and the judgment-creditor persistently maintains his right to proceed with the execution of the decree, the only inference which can be reasonably drawn from these circumstances, in the absence of any evidence to the contrary, is, that the proceedings in question are *bona fide*, and therefore sufficient to bar the operation of the law of limitation.

Omission to state specifically the amount of costs and interest due under the decree is not sufficient to warrant the final rejection of an application for execution of a decree.

*Mr. Justice Mitter, (Jackson, J., concurring.)*

—The main question we have to determine in this case is whether or no the decree which is sought to be executed by the Appellants, is barred by the provisions of the 20th Section of Act XIV of 1859.

We are of opinion that this question ought to be answered in the negative. That the decree was alive till August 1865, when a large sum of money was realized by the sale of certain properties belonging to the judgment-debtors, does not appear to be disputed; and the question before us is therefore reduced to this,—whether the applications for execution filed by some of the appellants in March 1868, and the proceedings which followed thereupon, are sufficient to meet the requirements of the Section above referred to?

The learned Judge who tried this case in the first instance refused to give to the appellants the benefit of those applications upon the ground that they were rejected by the High Court on account of certain defects and informalities mentioned by that Court

in its judgment. But looking to the nature of those defects and informalities, we feel constrained to say that the view taken by the learned Judge, is erroneous. That the applications in question were in the nature of proceedings taken for the purpose of enforcing the decree, does not seem to admit of any doubt, and if it be found that the applicants had acted in good faith and not merely with a view to save time, there seems to be no reason why they should not be allowed to rely upon those applications in answer to the plea of limitation raised against them by the judgment-debtors. Now the evidence bearing upon the last-mentioned point appears to us to be entirely in favor of the appellants. The defects on account of which the High Court threw out the applications of March 1868, do not, in our opinion, tend to shew that the applicants were acting in bad faith. Similar applications had been received and acted upon by the Court on several previous occasions, and there is, consequently, every reason to believe that the applicants were misled by the loose manner in which they had been allowed to proceed on those occasions. That they seriously intended to enforce the decree is fully borne out by their conduct. They caused notices to be served upon the judgment-debtors in the mode prescribed by law, and we further find that they persistently maintained their right to proceed with the execution until the final rejection of their applications by the High Court. In the absence of any evidence to the contrary, the only inference which can be reasonably drawn from these circumstances is, that the proceedings in question were *bond fide*, and therefore sufficient to bar the operation of the law of limitation.

The learned Judge further says, that the present application also is defective inasmuch as it does not state, specifically, the amount of costs and interest due under the decree. We do not think however that those defects are sufficient to warrant the final rejection of the application.

For the above reasons we set aside the decision of the Lower Court, and remand the case to that Court with directions to proceed with it according to law. We think the parties ought to bear their own costs both in this Court and in the Lower Court.

THE 1ST APRIL 1873.

Present :

The Hon'ble J. B. PHEAR and } Judges.  
" " W. AINSLIE, }

CASE No. 307 OF 1872.

*Miscellaneous Regular Appeal from an order passed by the Subordinate Judge of Sarun, dated the 25th September 1872.*

Mr. T. C. Leithbridge, Acting  
Manager of the Raj Bitteah,  
decreeholder, ... .. Appellant,  
versus

Rajah Saheb Prolad Sein, judgment-debtor, ... .. Respondent.

*For Appellant.*—Moonshee Mahomed Yau-soof.

*For Respondent.*—Mr. R. E. Twidale and  
Baboo Taruck Nath  
Dutt.

The judgment-creditor is unquestionably entitled, in executing the decree or order of the Privy Council, which is not barred by lapse of time, to get the benefit of the decrees or orders which that Privy Council decretal order affirmed.

The proceedings which are had in the High Court for the purpose of getting the Privy Council order sent down to the Lower Court for execution must be taken as proceedings *bond fide*, had for the purpose of keeping the decree to which the judgment-creditor is entitled, alive, no matter whether such proceedings are strictly legitimate or not.

*Mr. Justice Phear.*—I think that this appeal ought to succeed on two grounds: in the first place, the respondent has admitted that the Privy Council decree or order can be executed as it has not been barred by lapse of time. If that be so, and inasmuch as it seems to me that the Privy Council order affirming the previous decrees must comprehend and embrace those decrees, it is somewhat incorrect to speak of executing those decrees as separate decrees, for they fall to be executed with the execution of the Privy Council order; in other words, the judgment-creditor is unquestionably entitled in executing the decree or order of the Privy Council to get the benefit of the decrees or orders which that Privy Council decretal order affirmed. To my mind it would be almost absurd if it were otherwise.

The second ground upon which I think the appeal ought to succeed, is, that it seems to me that the proceedings, which were had in this Court for the purpose of getting the

Privy Council order sent down to the Lower Court for execution, must be taken as proceedings *bona fide*, had for the purpose of keeping the decree to which the judgment-creditor was entitled, alive. It is not necessary, I think, that we should say whether those proceedings were strictly legitimate or not. It may be or may not be that notwithstanding Section 2 of Act XXV of 1852, the mere regular and proper course for the purpose of getting the record and the copy of the Privy Council judgment into the Court which has to execute the decree, is to apply for that purpose in the first instance to the High Court. In some cases I imagine that it must be necessary to take that step, in as much as the Court of first instance would not be able to know what was the precise decree which it ought to carry out without the instruction of the High Court. However, as I have already said, I do not think it necessary to enquire in this case whether those proceedings were actually necessary for the judgment-creditor to take, because I think that they were *bona fide* efforts made by the judgment-creditor to enforce and carry into effect the order which he had obtained from the Privy Council; they were not in any way illegal or wrong. It seems to me that he ought at any rate to have the benefit of them, if they save his time, notwithstanding the provisions of Section 2, Act XXV of 1852. The order, therefore, of the Subordinate Judge ought to be varied in this respect, that it ought to order execution of the first and second decrees, as well as the third decree, that of the Privy Council.

The appellant must have his costs. Plead-er's fees two Goldmohurs.

*Mr. Justice Ainslie.*—I do not feel quite sure that the admission of the judgment-debtor in this case was not made on the understanding that the period of three years' limitation does not apply to decrees or orders of her Majesty in Council, and therefore I prefer resting the judgment entirely upon the second ground stated by my learned brother.

THE 17TH APRIL 1873.

Present :

The Hon'ble W. MARKBY, }  
" E. G. BIRCH, } Judges.

CASE No. 486 OF 1872.

*Special Appeal from a Decision passed by the Additional Judge of Hooghly, dated the 18th September 1871, affirming a decree of the Moonsiff of Serampore, dated the 3rd May 1871.*

Brindabun Chunder Roy,  
Gopeekishen Gossamee and  
others, plaintiffs, ... Appellants,

versus

Mr. F. H. Pellow, Chairman,  
and Mr. J. A. Hopkins, Vice-  
Chairman of the Principal  
Commissioners of the Town  
of Serampore, defendants, ... Respondents.

*For Appellant.*—Baboo Chunder Madhub  
Ghose.

*For Respondent.*—Baboos Unnodaprosad  
Banerjee and Mohesh  
Chunder Chowdhry.

Section 79 Act III of 1864 B. C. does not authorize Municipal Commissioners to close a burning-ground which has been used for very many years, merely because they think that the burning of dead bodies is offensive.

The Civil Courts of this country have jurisdiction to enquire into and control the action of Public Bodies where they have acted in excess or in contravention of the powers conferred upon them.

The proceedings of the Municipal Commissioners though they are proceedings of a public body, are not the proceedings of a Court. They are altogether ex parte and informal.

*Mr. Justice Markby.*—THIS suit was brought by Brindabun Chunder Roy and fifty-six other persons, inhabitants of Serampore and Chatra against the defendants who are the chairman and vice-chairman of the Municipal Commissioners of the town of Serampore, asking for a decree maintaining and declaring their right to burn dead human bodies at a ghat known as Kally Baboo's Ghat, which the plaintiffs state to have been used as a burning ghat for about 200 years, but which, on the 15th September 1870, the defendant Mr. Hopkins, the vice-chairman of the Municipal Commissioners, ordered to be closed. The defendants in their written statements objected first, that no notice of suit had been served as required by Section 87 of Act III of 1864, Bengal Council; and secondly, that the suit was barred by the limitation prescribed in that Section; and failing these objections

they alleged that the ghat had been closed under the provisions of Section 79 of the last-mentioned Act.

In their written statement the proceedings which were taken by the Municipal Commissioners for closing the ghat are thus stated:—"On the 22nd March 1864, the Brigadier General of Barrackpore forwarded his complaint to the Deputy Magistrate of Serampore regarding the nuisance occasioned by the burning ghat opposite to Barrackpore Cantonment. Accordingly depositions of several officers and gentlemen and that of several professed medical men were taken into consideration; and after the selection of a suitable burning ghat so as to cause no nuisance to the inhabited portion as well as to Barrackpore Cantonment, a report on the subject was made to His Honor the Lieutenant-Governor of Bengal for the removal of the burning ghat. The reply from Government was received to the effect that the ghat was to be removed, *vide* accompanying Government letter No. 4006 (Exhibit No. 1) and *Calcutta Gazette* (Exhibit No. 2), subsequent to the Government sanction having been obtained, a notice was affixed on a conspicuous part of the ghat for closing it, which, if required, may be proved by evidence and production of the copy book of notices (Exhibit No. 3) kept in this office."

"The accompanying copies of evidence of Dr. J. Sutherland, M. D., Deputy Inspector General of Hospitals, Barrackpore, Dr. R. F. Thompson, Civil Assistant Surgeon, Hooghly, and Baboo Dwarka Nath Chatterjee, Sub-assistant Surgeon, Serampore, (Exhibits 4, 5, and 6), taken down in the case and authenticated by the vice-chairman, which I think is admissible under Act II of 1852, will prove the evidence of competent persons as the provisions of Section 79 of Act III of 1864, requires taken down before the closing of the ghat was ordered."

Somewhat indefinite issues were raised upon these allegations, but the result was that the Moonsiff held that the suit was brought within time, but that the notice of suit was insufficient. He also held that the burning ghat had been closed in accordance with the provisions of Section 79 of Act III of 1864; and he dismissed the suit.

On appeal, the additional Judge held that the notice of suit was sufficient, but he also,

in effect, finds that the ghat had been legally closed under the provisions of the Act; and he dismissed the appeal.

The plaintiffs have appealed, and it is contended in Special Appeal that this decision by the additional Judge is wrong in point of law, and that the proceedings of the Municipal Commissioner were illegal and void for two reasons; first, because the order was made upon three reports, which not being on oath or affirmation were not "evidence," as required by the Act; and secondly, because these reports, even if they are "evidence" do not, as the Act requires, shew that this burning ghat is in such a state as to be dangerous to the health of persons living in its neighbourhood.

The documents, which the Municipal Commissioners appear to have had before them and which they treated as evidence, were three certificates, which are as follows:—

(1) "I, John Sutherland, M. D., Officiating Deputy Inspector General of Hospitals, Barrackpore circle, do hereby declare that the burning of the dead bodies on the Serampore side of the River Hooghly opposite, or nearly opposite the houses of European residents at Barrackpore, is regarded by myself and other residents of this part of the station as a disgusting and loathsome nuisance. It was recently found necessary to shut all the doors on the river-side of my own and, I believe, other houses, to exclude the disgusting stench from dead bodies undergoing cremation."

"The influence of such burning on the health of the residents at Barrackpore cannot easily be estimated, but I have no hesitation in stating that I regard the burning of dead bodies near to and windward of the station as hurtful, and that in my opinion the offensive gaseous emanations resulting from the action of fire on human bodies, are injurious to the health of the persons within their influence."

(2) "I, R. F. Thompson, Civil Assistant Surgeon of Hooghly, do hereby sincerely declare that the burning of dead bodies on the Serampore side of the River Hooghly, is, in my opinion, not only highly prejudicial to the health of the people in its locality, but also to the residents on the opposite side of the river at Barrackpore."

(3) "I, Dwarka Nath Chatterjee, Sub-Assistant Surgeon, Officiating Medical



"Officer of Serampore, do hereby declare that I consider the existence of so many burning ghats along the Serampore and Chatra banks of the river as a great nuisance, and that I believe one place, for the cremation of the dead at a convenient distance and fenced on three sides by pucca walls, will be an improvement on the present sanitary condition of the town."

The contention of the appellants is, "that these documents are not evidence, because the word 'evidence' imports that the statement should be made under the sanction of an oath or some form of affirmation equivalent thereto as is required when evidence is taken in Courts of Justice."

The Additional Judge has said as to this, that "as the Municipal Commissioners had no power to take evidence on oath on matters of this kind, the word 'evidence' most clearly means evidence without oath."

Possibly, if the fact was so, and the Municipal Commissioners had no power to administer an oath, the inference would be correct; but I do not see why it is said that they have no such power. By Section 6 every Commissioner for the purposes of this Act is vested with the powers of a Magistrate under Section 23 of the Code of Criminal Procedure, and this would seem to be sufficient to authorize him to administer an oath, if the purposes of the Act require that he should do so. We must, therefore, consider the meaning to be attributed in this clause of the Act to the word 'evidence,' which appears to me to depend upon whether or no the proceeding to be taken under this Section, is, or is not, a judicial proceeding. If it is, then, upon the principle upon which the case in the 12th *Weekly Reporter*, page 60, Criminal Rulings, appears to have been decided by the Full Bench, the evidence must be taken on oath. If it is not, then I think the Municipal Commissioners might act upon these reports, if they deemed them to be trustworthy. It seems to me that this is not a judicial proceeding. No provision is made for enabling any person as of right to appear and shew cause against the order which the Municipal Commissioners may be about to make, or even for any notice being given as to the intention of the Municipal Commissioners to take steps to close the ghat or burial ground. No certificate or formal

decision of any kind is required, and though it is true that the Acts of the Municipal Commissioners under the Section may interfere with private rights which are highly valued, and though it would, in my opinion, be wise and prudent that they should give to their proceedings the utmost publicity, and give to the persons interested an opportunity of being heard, yet, when the Act does not require any of the other usual formalities of a judicial proceeding, I do not think the single requirement of an oath or affirmation was intended to be retained. Of course, I do not mean that the answer to a casual inquiry even by a competent person would be evidence which the Municipal Commissioners could act upon. But I think regular reports signed by medical men constitute the evidence of competent persons within the meaning of the Act.

With regard to the other objection, that even if a report not on oath can be treated as evidence, still these reports do not constitute any evidence that this ghat is in a state dangerous to the health of persons residing in the neighbourhood; it is obvious that there cannot be any consideration in the present suit of the sufficiency of the information upon which the Municipal Commissioners acted. The only thing that could be considered in this suit is, whether there were before the Municipal Commissioners any materials upon which they could, and upon which they did, come to the conclusion, that this ghat was in such a state as to be dangerous to the health of persons living in the neighbourhood. It is contended that there were not, because these reports shew nothing whatever as to the state of this particular ghat, and could not possibly, upon any construction of them whatsoever, lead to the conclusion, that this burning ghat was in such a state as to be dangerous to health. At any rate if that is not precisely what is contended, that is what the plaintiffs must establish before the order of the Municipal Commissioners can be questioned. It was assumed by the appellants that the three reports above set out were the only evidence before the Municipal Commissioners, and the arguments of the respondents have proceeded throughout upon the same assumption; and of course the evidence taken at this trial can only affect the question now before us as shewing what the proceedings of the Municipal Commissioners really were. We have therefore to consider what these three



reports amount to, and they certainly do appear to me to shew nothing whatever as to the state of this ghat. In fact, these reports, as well as the inquiry, seem to me to be addressed throughout to the wrong question. The question under the Act is not as to the practice of burning or burying dead bodies, but as to the locality where the burning or burying takes place. If the burial place is so surcharged, or from imperfect burning or some other reason there is such an accumulation of that which is noxious in a burning ghat, as to be dangerous to the health of persons living in the neighbourhood, then, after providing another suitable place, the burial ground or burning ghat which is in this objectionable state may be closed. But there is no power to interfere with the practice of burying or burning, so long as the burial ground or or burning ghat is not itself in a noxious condition.

This is analogous to the provisions of the Public Health Act in England where a similar power is given to close a burial ground, but only in case it should be found to be in a state dangerous to health by reason of its being surcharged (Section 11 and 12 Vict. c. 63 s. 82).

In a case where no formal proceeding of any kind has taken place, it is not very easy to ascertain exactly what has been done; and we ought not to declare the proceedings of a body having important public functions to perform to be void, unless it is quite clear that they have failed to comply with the provisions of the law. But it appears, I think, from all the evidence that the Municipal Commissioners have throughout misunderstood their powers under this Section. The matter appears to have originated in a complaint of the Officer commanding at Barrackpore, who, of course, could not be affected by the state of the ghat, but only by the practice of burning; and to this point the attention of the Municipal Commissioners seems to have been directed throughout. This appears very clearly from the deposition of the Vice-Chairman, Mr. Ryland, who conducted these proceedings. He appears to have had the evidence of his own senses that the stench caused by burning was highly disagreeable. But when in company with one of the medical men he inspected the ghat, he says, "I did not then smell anything inasmuch as there was no body burning."

This I think shews the light in which the matter was considered by the Municipal Commissioners, and I think it is impossible upon the three reports upon which they acted to carry the matter further than that in the opinion of these three gentlemen, the practice of burning dead bodies *any where* is prejudicial to the health of persons living anywhere in the neighbourhood. In fact, these three reports would apply just as well to any other burning ghat in Serampore which the Municipal Commissioners wished to close as to the one which is the subject of this suit; and if we hold the proceeding of the Municipal Commissioners in this case to be valid, we shall in effect hold that they have power under this Act to prohibit intramural burning and burying altogether.

It appears to me, therefore, that we are bound to hold that there was not before the Municipal Commissioners any evidence of such a nature as the Act requires, and that their proceedings under Section 79 were, therefore, invalid.

The defendants, however, have now taken for the first time an objection that no such suits as the present will lie. They did not raise this question in either of the Courts below, but they now contend that this Court has no jurisdiction to interfere with the action of a public body, that no person can maintain a suit for the mere declaration of a public right, but can only maintain an action for damages when he has himself suffered some injury.

There being absolutely nothing analogous to the position of the parties in this suit under the Hindoo Law, and the institution of a body of Municipal Commissioners with large sanitary powers being a purely European institution, we are compelled to look for analogy in the law of England where such an institution is well known and established, now the general jurisdiction of the Courts of Law in England to inquire into and control the action of public bodies where they have acted in excess or contravention of the powers conferred upon them is undoubted. I need only cite as an example the observation of Lord Justice Turner in *Biddulph versus The St. Georges' Vestry* 25, Law Journals, chapter 417, where, though in that case the learned Judge thought the Court ought not to interfere, he takes care to say, "Now I am very far from thinking that this Court has not power to interfere

"with public bodies in the exercise of powers which are conferred on them by Act of Parliament. I take it that it would be within the power and duty of this Court so to interfere in cases where there is not a *bond fide* exercise of the power given by the Act of Parliament, and I should be very sorry to be supposed to entertain the notion that public bodies under the general power given them by Act of Parliament, can do whatever they think right." I think the same principle would apply here. It should, of course, be presumed that a public body of this kind acting on behalf of the public are acting *bond fide*; and their whole conduct must be looked to in order to see whether they have substantially complied with the powers conferred upon them by the Legislature. But it is obviously necessary that there should be some control over persons exercising such very large arbitrary powers, and that they should feel that their conduct is liable to be investigated both as to its good faith and as to their action being within the limits of their powers.

It is said that the Act of the Municipal Commissioners has in this case been sanctioned by the Lieutenant-Governor. But I must observe that on the evidence it appears that this sanction was accorded upon a letter which states that the burning ghat "has been deemed in the opinion of Dr. Sutherland, the Inspector General of Hospitals, Dr. Thompson, Civil Surgeon of Hooghly, and Baboo Dwarka Nath Chatterjee, Sub-Assistant Surgeon of Serampore, who visited the place to be dangerous to the health of persons living in the neighbourhood." I cannot, however, find anything (as I have already said) in the report of either of these gentlemen as to this particular burning ghat, and such a statement was calculated seriously to mislead any person to whom it was submitted. Moreover, I am not prepared to say that the sanction of the Lieutenant-Governor is conclusive. The responsibility of the proceeding does not rest with the Lieutenant-Governor, but with the Commissioners, nor has the Lieutenant-Governor any power in this matter, except that which he derives from the Act; and even in a case where a certain act was done by the express order of the Secretary of State under the authority of Her Majesty in Council, the Court of Queen's Bench declared the

act illegal. *Dodd vs. Fontee*, Law Reports, Vol. I, p. 347.

It is possible that in England in a case similar to the present, the suit would have to be brought in the name of the Attorney General which in practice amounts to the same thing as saying that the Attorney General's consent must be obtained to the bringing of the suit. No doubt that operates as some security that the proceeding is a *bond fide* one. In this country there is no officer in the position of the Attorney General whose sanction the parties could obtain, though I do not doubt that the Court itself could refuse to interfere if the suit were vexatious or harassing, or not for the public benefit. Here there is no suggestion of the kind, the conduct of the plaintiffs having, as far as I can see, been straight forward and moderate throughout. It is perhaps hardly necessary to point out the difference between the proceedings of a body of Municipal Commissioners and the proceedings of a Court. Of course if this were the proceedings of a Court acting judicially, we could not interfere nor would our interference be necessary, because then, no doubt, the proceedings of the Commissioners would be conducted in a wholly different manner. There would be a hearing; evidence and arguments would be heard on both sides; and there would be a formal determination, in all probability subject to appeal. The act of a Court of competent jurisdiction cannot be set aside by another Court, except upon appeal or under some special powers of superintendence and control; though it may come to be questioned when any person calls that act in aid for his own protection. But the proceedings of the Municipal Commissioners though they are proceedings of a public body are not the proceedings of a Court. They are altogether ex parte and informal.

The only alternative remedy is that suggested by the respondents in the argument; namely, that the question should be tried when an attempt to burn a body was made and interfered with. But besides that it is obvious that such a remedy would be wholly inefficacious for those whose rights are interfered with, it would also be highly inconvenient for the Municipal Commissioners who, before the question could be determined, would be exposed to a vast number of suits.

We think the course taken by the plaintiffs a much more reasonable one. They

presented a petition to the Municipal Commissioners before the act was done of which they complained, and when that was not complied with, they have submitted the action of the Commissioners once for all to the consideration of the Civil Court.

For these reasons I think the decrees of the Lower Courts ought to be reversed; that it ought to be declared that the order of the Municipal Commissioners under which this burning ghat was closed, was illegal, and that the plaintiffs have a right to burn dead bodies at this ghat, the order of the Municipal Commissioners notwithstanding.

*Mr. Justice Birch.*—It is difficult to ascertain from the record what steps were taken by the Vice-Chairman of the Municipality before he ordered this burning ghat to be closed. There seems to have been nothing analogous to a judicial proceeding. No notice was served on the proprietor of the ghat, no opportunity was offered to him of showing that there was nothing in the state of the ghat to warrant the interference of the Municipal Commissioners. No complaint appears to have been preferred by any of the persons residing near the ghat. The Officer, commanding at Barrackpore on the opposite side of the river, appears to have been the first to complain of the burning of bodies at this ghat as a "nuisance." The ghat had been used for a great many years (the plaintiffs say 200) for cremation, and no complaints appear to have been made by the residents of Barrackpore in previous years. Early in 1864, the ghat was suddenly closed by the Deputy Magistrate, but his proceedings were quashed upon their being brought to the notice of this Court. The Court remarked that "proceedings taken with a view to stop such a long standing practice must be conducted strictly according to the Law, and evidence should be taken as to the character and effect of the nuisance of which complaint is made." Shortly after this the Municipal Act was extended to Serampore, and early in 1866 the Municipal Commissioners appear to have determined to prevent the burning of bodies at this and other ghats. The Deputy Inspector General of Hospitals, on the 9th April 1866, sent to the Commissioners a written declaration that the burning of dead bodies on the Serampore side of the river, nearly opposite the houses of the European residents at Barrackpore, was regarded by

himself and other residents at that part of the station as a "disgusting and loathsome nuisance," and was in his opinion hurtful and injurious to the health of persons within the influence of the gaseous emanations resulting from the action of fire on human bodies. This document and the certificates of the Civil Surgeon of Hooghly, and the Sub-Assistant Surgeon of Serampore only go to shew that in the opinion of these gentlemen the burning of dead bodies on the Serampore side of the river is a nuisance and prejudicial to the health of people residing near the ghat and on the other side of the river opposite thereto. There is nothing in any of these opinions as to the state of this particular burning ghat. In 1868, the Vice-Chairman of the Municipality appears to have taken action on these documents and to have reported that the ghat was deemed dangerous to the health of persons living in the neighbourhood; in due course the sanction of the Local Government was obtained to the closing of the burning ground, and an order prohibiting cremation was affixed on the spot on the 24th June 1869. The proprietor of the ghat, on the 24th August following, submitted to the Vice-Chairman a carefully-worded protest against the order of prohibition, and prayed for a reconsideration of the order and reference to higher authorities. This application was not attended to, and the parties aggrieved by the order were compelled to resort to the Civil Court.

The defendant the Vice-Chairman contends that he had lawful power to prohibit the burning of dead bodies at this burning ground, and cites Section 79 Act III of 1864 B. C. as his warrant for what he has done. That section does not authorize Municipal Commissioners to close a burning ground which has been used for very many years, merely because they think that the burning of dead bodies is offensive. It allows them to interfere only when it shall appear to them upon the evidence of competent persons that any burning ground is in such a state as to be dangerous to the health of persons living in the neighbourhood thereof. The condition precedent to their taking action under the law from which they derive their authority is wanting in this case. The Vice-Chairman had before him no evidence as to the state of this burning ground. Assuming that the reports of the Medical officers submitted were evidence they say nothing

as to the state of this burning ground, and the Vice-Chairman was clearly in error in reporting to the Commissioner that the burning ground had been "deemed on the opinion of the Medical officers consulted to be dangerous to the health of persons living in the neighbourhood." The defendants plea that the action of Municipal Commissioners cannot be questioned in the Civil Court is one which I cannot allow. The right to compensation contemplated in Section 87 of the Act as accruing to persons sustaining injury from the exercise of their statutory powers by Municipal Commissioners is not the only relief. The restraining and regulating jurisdiction of the Civil Courts of the country extends to Municipal as well as other public Boards. It would be dangerous to leave the power conferred on Municipal Commissioners free of all control, and it is for the Civil Court to determine whether the Commissioners have acted in excess of the statutory powers entrusted to them. Numerous cases might be found in the English reports showing how the Courts of Law interfere to restrain public Boards and Commissioners from acting in excess of their statutory powers. If they exceed those powers their orders are *ultra vires*, and will be set aside. The same principle must guide us in disposing of this case. It is, probably, the first of its kind that has come before the Courts in this country, and it has been carefully considered. The argument that has been urged before us on the part of the defendants, has been similar to that used in the case of *Tinkler v. Wandsworth Board of Works*, De G. and J., Vol. 2, p. 261, there it was argued on behalf of the defendants that the Board were the proper Judges of the state of a particular property upon which they found what they considered a nuisance, and were the proper persons to prescribe the remedy, and it was further contended that public bodies while acting within their statutory power could not be interfered with by the Courts on the ground that they are not exercising a sound discretion in their proceedings. It was held by the Court of Chancery that the Board of Works had exceeded their statutory powers and had acted *ultra vires*.

Lord Justice Turner's judgment concludes with these words which are as applicable to the Municipal Commissioners of Serampore as they were to the Wandsworth Board of Works: "It may be as well to caution

these defendants that entrusted as they are with very extensive powers, it is their bounden duty to keep strictly within those powers and not to be guided by any fancied view of the spirit of the act which confers them."

Burning grounds must according to the custom of the country be allowed. Municipal Commissioners have full power to ensure that they are kept in proper condition, but they are not authorized to close them except under the circumstances set forth in Section, 79 Act III 1864. I consider that the defendant has exceeded his statutory powers in acting as he has done, and I concur with my learned colleague in holding that the burning ground was illegally closed and that the illegal order must be declared null and void.

THE 19TH APRIL 1873.

Present :

The Hon'ble F. B. KEMP and } Judges.  
" " F. A. GLOVER }

*Special Appeals from a Decision passed by the Subordinate Judge of Sylhet, dated the 1st April 1872, modifying a decree of the Moonsiff of Russoolgunge, dated 23rd January 1871.*

CASE NO. 958 OF 1872.

Mahomed Ashruf, (defendant) ... *Appellant*,  
*versus*

Brejeshuree Dasse and others,  
(plaintiffs) ... *Respondents*.

CASE NO. 959 OF 1872.

Mahomed Ashruf, (defendant) ... *Appellant*,  
*versus*

Ramnarain Deb and others,  
(plaintiffs) ... *Respondents*.

CASE NO. 960 OF 1872.

Mahomed Ashruf, (defendant) ... *Appellant*,  
*versus*

Rajkissen Deb and others,  
(plaintiffs) ... *Respondents*.

*For Appellants*.—Baboos Sree Nath Dass and Grishchunder Ghose.

*For Respondents*.—Baboos Bama Churn Banerjee.

Gya Shraddh is a legal necessity for which a Hindoo widow can alienate a portion of her estate.

Mr. Justice Glover.—These are cognate appeals. The plaintiff is a purchaser from

the reversionary heir of one Mudun Mohun, and in that capacity sues to recover possession of three small plots of land belonging to Mudun Mohun's estate, the widow having died.

The defendant claims by purchase from an original purchaser from the widow Huriprin, and alleges that the latter sold the land for purposes which the Hindoo Law allowed, *viz.*, payment of her husband's debts, performance of his Sradh at Gya, and marriage of his daughter.

The Moonsiff held that there was no proof of any necessity to sell, and no proof that the land was sold either for Mudun Mohun's debts or for his daughter's marriage. He refused to allow the performance of the Gya Sradh to be a necessity justifying a sale.

The Subordinate Judge upheld the order of the first Court.

The point taken before us in Special Appeal is that the Subordinate Judge did not take into consideration, the question whether or not the widow went to Gya to perform her husband's Sradh, and whether there was a sufficient necessity according to Hindoo Law for her selling property to enable her to do so. The appellant also objected that the Subordinate Judge had given no opinion as to the necessity of the Gya Sradh.

I do not I confess see much probability of the Special Appellants' gaining any thing by a remand, but at the same time I think he has a right to ask it. The Subordinate Judge had decided that there was no proof of Muddun Mohun's having left debts nor that the marriage expenses of his daughter required the sacrifice of his landed property, but he has not found on the other alleged necessity, *viz.*, the Gya Sradh.

Now according to Hindoo ideas, the performance of a deceased husband's Sradh at Gya, would be a very proper and reasonable necessity in as much as the soul of the deceased is supposed to be greatly benefitted thereby. Such a pilgrimage would undoubtedly be a religious purpose supposed to conduce to the spiritual welfare of her husband which would give a widow a larger power of disposition than she would ordinarily have (Collector of Mosolipatam *versus* Caraly Venkata Narasafa, 2 Weekly Reporter, P. C. 64). But I do not understand, that the Sradh pilgrimage to Gya can be put any higher than a very necessary and meritorious performance. A widow ought perhaps to perform it, but she is not abso-

lutely bound to do so—it is, I should say, one of those ceremonies for the due performance of which a widow might fairly and properly alienate a moderate portion of her late husband's estate, but that she would not be justified in disposing of the entire property for that object, (Vyvastadurpuna 63, Volume 1.)

The Subordinate Judge must decide therefore on the evidence, whether the defendant has proved that there was any necessity for selling these three plots of land, for the purpose of providing funds for the Gya Sradh which would no doubt involve the question whether Muddun Mohun left other property from the income of which the pilgrimage in question might have been performed without selling the landed estate. My own impression after reading the Subordinate Judge's judgment, is, that he found that there was such an income, but the wording is not, I admit, very clear.

It has been said that the defendant will have great difficulty at this distance of time in proving what is necessary. No doubt he will have great difficulty—and so far as I have seen the evidence I doubt whether any decision on this point could be come to. But the defendant is himself to blame. It is clear from his written statement that he knew what he had to prove, and if his witnesses do not in the opinion of the Subordinate Judge prove it, he cannot complain if his judgment is against him.

All purchasers from a Hindoo widow know or ought to know by this time the extreme risk of such a transaction, and, if they choose to run it, and to buy, without consulting the next heirs, or without taking some further steps as would enable them at some future time should necessity arise, to prove that they made diligent and careful enquiry as to the existence of a legal necessity before buying, they must take the consequences. The defendant here is rather in a worse position, as he is a purchaser from the original buyer. However, if he considers that there is sufficient evidence on the record to enable the Subordinate Judge to decide, that there was no income from Mudun Mohun's estate, and that the only way for the widow to perform the Gya Sradh was to sell the land; he is entitled to ask for a remand for the purpose of supplying the commission.

If the Subordinate Judge considers that in respect of any of the three plots, there is

evidence sufficient, he will dismiss the plaintiff's claim so far—it being, I consider, a reasonable necessity according to Hindoo Law that a widow should perform her husband's Gya Sradh, if circumstances render it practicable, and that she may for this purpose alienate at least a portion of his estate.

Costs will follow the result.

*Mr. Justice Kemp.*—I concur.

THE 23RD APRIL 1873.

*Present :*

The Hon'ble Sir RICHARD  
COUCH, Kt., ... *Chief Justice.*  
The Hon'ble LOUIS S. JACKSON and }  
" " DWARKANATH MITTER } *Judges.*

CASE NO. 12 OF 1872.

*Regular Appeal from a Decision passed by the  
Second Subordinate Judge of Zillah 24-  
Pergunnahs, dated the 12th of October  
1871.*

Kally Prosunno Bose, plaintiff, ... *Appellant,*  
*versus*

Dinonath Bose Mullick, de-  
fendant ... *Respondent.*

*For Appellant.*—Mr. J. T. Woodroffe, Baboos  
Mohesh Chunder Chow-  
dhry and Anund Chu-  
nder Ghosal.

*For Respondent.*—Baboos Sree Nath Dass  
and Bhogobutty Churn  
Ghose.

Where a purchase is made in the name of another, in a suit regarding the said purchase, the real purchaser must be the plaintiff and the suit cannot be maintained in the name of the other person.

Where an estate is geographically situated in two different districts, the Civil Court of the district in which the revenue of the said estate is paid, has power to attach and sell the whole estate in execution of a decree.

Under Section 284 of the Civil Procedure Code, a Civil Court passing a decree may transmit it for execution to another Court even there is property situated within its local jurisdiction.

*The Chief Justice Jackson and Mitter, J. J., concurring.*—THE facts of this case are that the Land Mortgage Bank having obtained a decree in the Court of 24-Pergunnahs against Hubeebul Hossein and his wife Dureentun Nissa Bibee for Rs. 2,48,991-4-0, principal and interest, and Rs. 4,493-12-0, costs and interest, applied to that Court for execution of the decree by attachment, and sale of a dwelling-house and land in Bhowanipore, in Zillah 24-Pergunnahs, and

of property described as lot Khosdaha, Pergunnah Khosdaha, in Toujee No. 298, in Zillah Nuddea, the Government Revenue of which is Rs. 11,261-11-4. On the 25th of August 1869, it was ordered that the property situated within the local jurisdiction of the Court of 24-Pergunnahs should be attached. On the 26th of August, the Land Mortgage Bank by its manager petitioned the Judge that the property in 24-Pergunnahs be not sold, and a certificate be granted as regarded the property situated in Zillah Nuddea, for the attachment and sale thereof in that Zillah. On the 1st of September, it was ordered by the Judge of 24-Pergunnahs that the original certificate, copy of the decree and copies of the two petitions should be sent to the Judge of Zillah Nuddea, and the case should be struck off from the file of the cases pending decision in that Court. The attachment and sale of the property in 24-Pergunnahs was not proceeded with. The striking of the file of the Court seems to have been improper, and, we fear, was caused by the very prevalent desire to shew as few pending suits as possible. The certificate of the Judge of 24-Pergunnahs, dated the 1st of September, states that no portion of the amount of the decree had been realized by means of that Court. The Land Mortgage Bank thereupon applied to the Subordinate Judge of Nuddea for execution of the decree by attachment, and sale of the right title and interest of the judgment-debtors in "Kismut Khoshdaha lying within thannah Gyegehata, mehal No. 298 of the Toujee of the Collectorate of this Zillah, the Government revenue of which is Rs. 11,261-4-4, and which is recorded in the name of "Hubeebul Hossein." It was accordingly attached and sold by auction to the respondent for Rs. 3,00,100. Kismut Khosdaha consists of sixty mouzaha, eighteen in zillah 24-Pergunnahs, and forty-two in Zillah Nuddea, the whole being entered in the Towjee of the Collectorate of Nuddea as "No. 298. Pergunnah Kismut Khosdaha, taloukdar Hubeebul Hossein Government revenue Rs. 11,261-14-4." Hubeebul Hossein applied under Section 256 to have the sale set aside; and the case was tried on the 14th of April 1870, when the Subordinate Judge of Nuddea ordered that the sale should be confirmed. Among the pleaders present on behalf of Hubeebul Hossein was Baboo Kedar Nath Bose.

The plaintiff's case is that the Nuddea Court had no power to sell the eighteen mouzahs situated in 24-Pergunnahs; and that the sale of them was void. He alleges in his plaint that Hubeebul Hossein in consideration of Rs. 5,000 absolutely sold to him on the 19th Maugh 1277 (31st January 1871) whatever rights and interests he had in those mouzahs. But the evidence of Kedar Nath Bose, who was examined as a witness for the defendant, and who says that he was Hubeebul Hossein's pleader in almost all cases, shows that he was the real purchaser. He says, he and the plaintiff, who is his cousin, are living jointly and the property if recovered, will become their joint property. It has been objected for the respondent that the suit ought to have been dismissed, because the plaintiff was not the real purchaser. In *Fuzeelum Bibee versus Omda Bebee* 10, W. R., p. 469, it was held that where a purchase was made in the name of another, the real purchaser must be the plaintiff, and the suit cannot be maintained in the name of the other person. Taking the evidence of Kedar Nath Bose to be entirely true, he ought by the rule of Courts of Equity to have been a co-plaintiff; and for his not being so, the decree might be reversed on an appeal; the reason being that Kedar Nath Bose will not be bound by the decree in this suit.

We think this would be a sufficient reason for our dismissing this appeal. A false case as to the purchase has been put forward in the plaint; and we have little doubt that this was done designedly, and in order to conceal the part which Kedar Nath Bose had taken in the transaction. It is, however, desirable that the case should be decided on its merits. We think the Nuddea Court had power to sell the whole estate, and that, for the purposes of attachment and sale in execution of a decree, it must be considered as wholly situated in Zillah Nuddeah. If the Court of 24-Pergunnahs sold the 18 mouzahs, it would have no power to apportion the Government revenue. The purchaser would be liable to pay the whole, and would be involved in constant disputes with the owner of the other Mouzahs. Selling the estate thus in parts would greatly lessen the price that could be got for it, to the injury either of the decreeholder or the judgment debtor, but possibly to the benefit of speculative persons such as the pleader Kedar Nath Bose seems to be in this instance.

Unless the law is imperative this ought to be avoided. The Code of Civil Procedure has no special provision for such a case as this:—"Part of an estate in Section 149 means, we think, an aliquot part of an estate, which must frequently be attached and sold. In the proceeding in the Nuddea Court, it was possible to follow the directions of the code as to making known the prohibitory order (Section 239) and as to sales (Sections 248, 249) and they have been followed. There is no direction in the code to the contrary of this proceeding; and it appears to us that the estate may, as we have said, be considered as wholly in Zillah Nuddeah. Then so considering it, was the Nuddea Court authorized to sell? Section 284 says that a decree which cannot be executed within the jurisdiction of the Court whose duty it is to execute it, may be executed within the jurisdiction of any other Court in the manner following. The plaintiff (Section 285) may apply to the Court, whose duty it is to execute the decree, to transmit a copy of it with a certificate that satisfaction of it has not been obtained by execution within the jurisdiction of that Court. It will be observed, it is not that the decree cannot be executed. The Court (Section 286) unless there be any sufficient reason to the contrary is to cause the certificate to be prepared and transmitted to the Court which is to execute the decree; and (Section 287) the copy of any decree or order for execution, when filed in the Court to which it has been transmitted for execution, is to have the same effect as a decree or order for execution made by that Court. There was a certificate of the Judge of 24-Pergunnahs that the amount of the decree had not been realized by means of that Court. It was made upon the application of the plaintiff (The Land Mortgage Bank) in accordance with Section 285, and there was a decree to be executed. Those two facts were sufficient to give the Court of 24-Pergunnahs jurisdiction to grant the certificate. Strictly it ought not to have been granted until the house and land in 24-Pergunnahs had been sold; but this error does not make the certificate void and avoid the proceeding in the Nuddea Court. There is a wide distinction between a proceeding without jurisdiction, or in excess of jurisdiction and an erroneous proceeding in a matter within jurisdiction. The latter is ground for an appeal and one was presented, but not till the 15th of June 1870, after the



time allowed by law. In the case in 9, W. R., page 346, there was an appeal, and we understand the language of the Court in the judgment as used with reference to the case before it. We do not think the learned judges intend to lay down that where a decree has been executed by a Court other than that by which it was passed, the title of the purchaser may be avoided by showing that there was property of the judgment-debtor within the jurisdiction of the Court that passed the decree, which might have been attached and sold. The judgment indeed goes so far as to say that it is only when the decree cannot be executed against the property or person of the judgment-debtor that it may be sent to another Court for execution. This would render it necessary in all cases before a decree is sent to another Court for execution for the sending Court to enquire whether the defendant can be arrested; and if he can, to refuse the application. We believe it has not been the practice to do this. We are of opinion, upon the facts of the case, that the decree of the Lower Court is right; and the appeal ought to be dismissed with costs.

THE 1ST MAY 1873.

*Present :*

The Hon'ble LOUIS S. JACKSON and } *Judges.*  
 „ DWARKANATH MITTER, }

CASE No. 68 OF 1873.

*Miscellaneous Regular Appeal from an order passed by the Officiating Subordinate Judge of Moorshedabad, dated the 24th February 1873.*

Roy Luchmeeput Singh Bahadur, defendant ... *Appellant,*  
*versus*

The Secretary of State for India,  
 plaintiff .. .. *Respondent.*

*For Appellant.*—Mr. R. T. Allan, Baboos  
 Sreenath Dass and Rashbehary Ghose.

*For Respondent.*—The Advocate-General and  
 Standing Counsel.

In a suit by a party in possession of a property to restrain a decreeholder from attaching and selling it in execution of his decree as belonging to his own judgment-debtor no injunction can issue.

*Jackson, J., (Mitter J., concurring.)*—THIS is an appeal against an order of Baboo Brojendro Coomar Seal, Officiating Subordi-

nate Judge of Moorshedabad, granting an injunction under Section 92 of the Code of Civil Procedure for the purpose of stopping the execution proceedings in respect of certain properties specified which had been attached with a view to sale in execution of a decree obtained by Roy Luchmeeput Singh Bahadur against the Nawab Nazim of Moorshedabad. Upon the attachment of the property in question a claim had been put forward by the Secretary of State in Council as entitled in succession to the East India Company, to the immovable property in question. That claim was refused and as provided by Section 246, the Secretary of State immediately brought a suit to establish his right, and it was in this suit that the order now complained of was made.

It appears to me that regard being had to the terms of Section 92, and to the place which that Section occupies in the Code of Civil Procedure, its provisions are not applicable to a case like the present, and do not justify the issue of this injunction. The suit, although the Nawab Nazim has since been made a party under Section 63, was against Roy Luchmeeput Singh, and the injunction was specially directed against him. It cannot, I think, be said that the property in dispute was in danger of being wasted, damaged or alienated by this defendant nor has the property been, or is it at present, in any sense in his possession. That which the plaintiff apprehended and which was, in fact likely to occur, was that the defendant should, in executing his own decree, set the Court in motion and cause the right title and interest of the Nawab Nazim to be sold and conveyed to some other person. If such sale had taken place, and if the property had gone into the hands of some person who was likely to waste, damage or alienate, such injunction might have been properly and reasonably applied for. The course, which has been taken in the present instance, appears to me too nearly to resemble the action of the Court of Equity upon proceedings at common law in England to be applicable to proceedings of our Mofussil Courts, and I think, therefore, that the plaintiff entirely misconceived the course which he ought to have taken, in applying for this injunction. This, however, it appears to me, is only a matter of procedure. The parties before us in the present case are the very parties who were before the Court in the



execution claim and proceedings, and as in my opinion upon the state of facts disclosed in this case it would not have been proper for the Court to proceed to sell the property in dispute, I do not think that that which is in itself right and reasonable should be prejudiced, because the parties have taken technically an erroneous course. I cannot doubt that, if the Secretary of State had presented a further petition in Court in the execution case of Roy Luchmepoot Singh representing that upon the rejection of his claim he has now brought a suit to establish his right and praying that the sale should be postponed, the property continuing under attachment, the Court would and ought to have complied with his application. It appears to me therefore that we should direct the present injunction to be dissolved, but at the same time we should order that the application should be dealt with as if it were made in the execution proceedings, and that an order should be entered on those proceedings staying the sale pending the suit which has now been commenced, provided always that it should be competent to the decreeholder in case of any undue delay in prosecuting the suit to make a further application to the Court for an immediate sale. The order of the Court below being varied in this way, the case appears to me to be one in which we shall make no order as to costs.

THE 6TH MAY, 1873.

*Present :*

The Hon'ble J. B. PHEAR and } *Judges.*  
 „ „ W. AINSLIE, }

*Special Appeals from a decision passed by the Officiating Judge of Patna, dated the 12th March 1872, affirming a decree of the Moonsiff of Behar, dated the 21st June 1871.*

CASE NO. 843 OF 1872.

Nanhoon Sing, defendant, .. *Appellant,*

*versus*

Toofanee Singh, plaintiff, .. *Respondent.*

CASE NO. 877 OF 1872.

Mussamut Durgahan, defendant, *Appellant,*

*versus*

Toofanee Singh, plaintiff, .. *Respondent.*

*For Appellants.*—Messrs. R. E. Twidale and C. Gregory.

*For Respondent.*—Baboo Mohesh Chunder Chowdhry.

Held in conformity with decisions reported 16 W. R., P. 10 Full Bench Rulings and 18 W. R., P. 109 Civil Rulings, that the Courts must in each case estimate the amount or value of the subject matter in dispute for the purposes of jurisdiction by the aid of the best evidence available bearing upon the actual amount or value of that subject.

THIS was a suit brought to enforce a right of pre-emption; and the property which had been sold, was sold for 2,000 Rupees a consideration which may, under the circumstances of the case for the moment, be taken to represent the market value of the property. This suit, however, is valued only at Rs. 200. The Lower Appellate Court says,—“The first objection raised was want of jurisdiction.” As regards this, “it is urged that the plaintiff has under-valued his suit. Now it is true that the value of this suit is still placed at Rs. 200, the very amount which was declared to be an improper valuation at the time, when the former suit was brought; but then the present suit was not instituted until after Act VII of 1870 came into force; and under clause 6, of Section 7, of that Act, in suits to enforce a right of pre-emption the value is computed in accordance with para 5 of that Section, and in para 5 the value is declared to be ten times the revenue. Hence the present suit has been properly valued.”

Thus it appears that the Lower Appellate Court has overruled the objection as to the valuation of the suit upon the ground that the method of valuing pursued has been that which is directed by the rules of the Court Fees Act of 1870.

On Special Appeal it is urged that this ruling is wrong, and that for the purpose of jurisdiction in the Moonsiff's Court the valuation ought to have been made according to the market value of the property and not according to the Special rules prescribed in the Court Fees Act.

We are of opinion that this objection is a good ground to support the Special Appeal.

It appears to us that the decision of the Division Bench which is reported in page 109 of the 18th volume of Mr. Sutherland's Weekly Reporter, does, in fact, conclude the matter, and that unless we are prepared to differ from that decision we must give effect to the objection which has been made on Special Appeal.

The present Chief Justice in that case delivered the opinion of the Bench, and as the judgment is not a long one, I will read it in full: "The Subordinate Judge has held that the decision of the Moonsiff upon the question as to what was the value of the subject matter in dispute with reference to the jurisdiction of the Court is final, under Section 12 of the Court Fees Act. Now, it is admitted by Mr. Gregory that that is not so, and that would at once dispose of this Special Appeal, because it shews that his decision is erroneous, and that it would be necessary that the case should go down to him again. But upon the other question, namely, whether the value for the purpose of jurisdiction is to be computed according to the Court Fees Act, we think there is nothing to shew that it was the intention of the Legislature that that mode of computing the value was to be applicable to the question of the jurisdiction of the Court, and was to be used in ascertaining what was the value of the subject matter in dispute.

"Act VII of 1870 is an Act for making the Court Fees payable, and after providing in Section 6, that the fees shall be paid, there followed a series of provisions with regard to the way in which the Court Fees shall be estimated. In suits for lands, houses and gardens it is according to the value of the subject-matter, and such value shall be deemed to be as provided by the Act. We think that this must mean that the value is to be deemed to be such for the purposes of the Court Fees only, and not for other purposes. And Section 12 appears to support this view, because it treats this as being a question relating to valuation for the purpose of determining the amount of any fee, and it makes the decision upon the question final. We can see nothing in this Act which would lead us to suppose that the Legislative Council intended that these rules should be applied to the determining what was the value for the purpose of jurisdiction."

Therefore the decree of the Lower Appellate Court must be reversed, and so on.

And this decision of the Division Bench was in truth almost the necessary consequence of the principle laid down by a Full Bench of the High Court in a case which is reported in the 16th volume of the Weekly Reporter, page 10, Full Bench Rulings. The late Officiating Chief Justice, Mr. Norman, on that occasion stated the opinion of the Full Bench in these words:

"We are of opinion that whenever a plaint is rejected under the provisions of Section 30 of Act VIII of 1859, on the ground that the amount or estimated value of the claim, as stated by the plaintiff, is beyond the jurisdiction of the Court, an appeal is given by Section 36 from the order rejecting the plaint. We think it clear that the provisions in the note to the Stamp Act XXVI of 1867, which was passed for a totally different purpose, namely, to prevent appeals upon questions of Stamp duty where the sole question is as to the amount of Stamp to be impressed on the plaint, cannot have the effect of repealing by implication, the provisions of the code of Civil Procedure which in clear and distinct terms give a right of appeal where a plaint is rejected upon the ground that it is under valued. We think it clear that whenever for the purpose of determining the question whether or not the Lower Court was right in rejecting the plaint upon the ground that it had no jurisdiction to entertain the suit, it becomes necessary to try what is really and truly the value of the property in suit, the Court which has to determine the appeal upon the questions of jurisdiction has incidentally power to determine all those questions of fact which are necessary to enable it to arrive at a satisfactory determination on the question of jurisdiction. We think therefore, that there is no doubt that an appeal to the Subordinate Judge lay in the present case, and for the purpose of determining that appeal the Subordinate Judge had the power to enquire into and determine the question of the value of the property in suit."

The decision of the Full Bench in that case by which it was held that the question as to the value of the property for the purpose of jurisdiction, was a question of fact open to appeal, while the question as to the value of the property for the purposes of

Stamp duty, was not open to appeal but was a question to be finally decided by the Moonsiff under the terms of the Stamp Act in force, really seems to have had the effect of ruling that these two matters were essentially distinct—that valuation of the subject of suit for the purposes of the Stamp Act had been made by the Legislature a matter, separate and different from the valuation for the purposes of jurisdiction; because it is at once obvious, that if the question relative to the one is open to appeal while the question relative to the other is not open to appeal, it might well enough happen and would frequently happen that in one and the same suit before the suit came to a final determination, the values of the subject of suit arrived at by the two processes of valuation would be very different in amount. As the effect of these two decisions, it appears to me to have been made clear that the valuation which is to govern the jurisdiction of the Court, is a perfectly distinct matter, as I have already said, from the valuation according to which stamps and fees are to be levied.

The present Act which limits the jurisdiction of the Moonsiff according to the valuation or amount of the suit is the Act VI of 1871. The 20th Section of which runs in these words:—

“The jurisdiction of a Moonsiff extends to all like suits in which the *amount or value* of the subject matter in dispute does not exceed one thousand rupees.”

There is no provision in any part of the Act itself which goes to direct the mode in which the *amount or value of the subject matter in dispute* is to be calculated. Precisely the same words were used in Act XVI of 1868; which preceded the present Act VI of 1871. Section 13 of Act XVI of 1868 says:—“Moonsiffs are empowered to try all original suits cognizable by the Civil Courts of which the subject matter does not exceed in *amount or value Rupees one thousand.*”

The words used in both these Acts are *amount or value*; and we have nothing whatever in either of these Acts to indicate that the Legislature intended the *amount or value* for the purposes of Moonsiff's jurisdiction to be assessed or estimated in any established or special manner. The result then as it seems to me is inevitable, the two decisions to which I have already alluded having put it beyond doubt that the special rules of the

present Court Fees Act and of the old Stamp Act were not intended by the Legislature for this purpose, it is inevitable that the Courts must in each case estimate the *amount or value* of the subject matter in dispute for the purposes of jurisdiction by the aid of the best evidence available bearing upon the actual amount or value of that subject.

It appears to me further that this view of the case could be fortified by a consideration and discussion of the history, so to speak, of the Moonsiff's jurisdiction from the time of its first creation if it were necessary that I should go into any detail on this subject. But I think it sufficient for my present purpose merely to point out that the first of the two modern Acts to which I have just now referred, as dealing with the jurisdiction of the Moonsiffs, namely, Act XVI of 1868, while it repeals Regulation V of 1831, by the appended schedule as makes a special reference to it as a Regulation extending the powers of the Moonsiffs, Sudder Ameens, and so on. It is thus clear if evidence to this effect were wanted that the Legislature at the time of the passing of Act XVI of 1868 had expressly under its notice the several provisions of Regulation V of 1831, and in actual view of them so to speak used the words for defining the Moonsiff's jurisdiction which I have already read out. But Regulation V of 1831 limited the jurisdiction of the Moonsiff in a very special and express manner. While it raised the then existing jurisdiction of the Moonsiffs to the amount of Rs. 300, and also gave, I think, for the first time, (though about that I am not quite sure) powers to the Moonsiff to entertain suits for immovable property, it expressly enacted that, the rules prescribed in existing Regulations with regard to the mode of computing the value of the property in litigation, should be applicable for the purposes of computing the property in the case of Moonsiff's jurisdiction. Then again while that same Act created Principal Sudder Ameens, and authorized the District Courts to refer to them original suits under Rs. 5,000, it directed that the value for this purpose should be calculated according to schedule B of Regulation X of 1829, which was the Stamp Act then in force. And so also it directed that the amount which was to govern the jurisdiction of the Sudder Ameens should be calculated by the rules in the same schedule.

It seems to me exceedingly important in judging of the question which is before us that we find the Legislature when it used the words *amount or value* in the Act XVI of 1868, without further limitation or specification at all, had before it and under its notice the provisions of the Act which up to that time regulated the jurisdiction of the Moonsiff by express reference to the rules of the Stamp Act. We must take it, I think, that if the Legislature in framing the new Act which was to replace the old Regulation in regard to the Moonsiff's jurisdiction at that time refrained from directing that the value should be estimated according to the rules of the Stamp Act which might be passed from time to time as had before been the case, it must have done so advisedly.

On the whole, I am not prepared to differ from the decision of the Division Bench to which I have already referred, reported in 18, W. R., page 109, and it follows in my judgment that we must give effect to the objection which has been made in Special Appeal. It is admitted that there is no evidence upon which it can be sent back to the Lower Court with any chance of success for the plaintiff in regard to the assessment of the value of the property. Accordingly the suit is dismissed for want of jurisdiction. The plaintiff must pay the costs of the defendant in this Court and in the Lower Appellate Court.

The like order will, for the same reasons, be made in Special Appeal No. 877 of 1872.

THE 19TH MAY 1873.

*Present:*

The Hon'ble J. B. PHEAR and } *Judges.*  
" " W. AINSLIE,

CASE NO. 53 OF 1873.

*Miscellaneous Regular Appeal from a decision passed by the Judge of Zillah Tirhoot, dated the 19th September 1872.*

Baboos Hurryram and Sree Ram,  
decreeholders ... *Appellants,*

*versus*

Hurpershad Sing, opposite party... *Respondent.*  
*For Appellants.*—Baboo Ashootosh Dhur and  
Moonshee Mahomed Yousoof.

*For Respondent.*—None.

Held by Phear J. that the *apparent* first purchaser was the person to whom recourse should be had for the difference of price under the terms of Section 254, Act VIII. of 1859, and that a process of execution could not, in any case, rightly issue against the defaulting purchaser for the difference of price, until an order for payment of that difference has been made upon him, and no such order could rightly be made upon him without affording him an opportunity of showing cause against it.

Held by Ainslie J. that a Court would not be justified in declaring upon the bare allegation of a certain person unsupported by any vouchers, that a certain other person was the person responsible for the payment of the purchase money.

*Mr. Justice Phear.*—I REGRET very much that I find myself unable to take precisely the same view as my learned brother of the merits of this case, and cannot concur in making the order which he proposes.

It appears to me that the Judge has in substance though perhaps not in terms dealt rightly with the matter of this appeal.

I need not repeat the facts which have been fully stated by Mr. Justice Ainslie. The execution creditor applied for execution against the respondent under the terms of Section 254 of the Civil Procedure Code; and it is clear that he was only entitled to have his application granted if the respondent was the purchaser of the property at the first execution sale. We have no other facts before us than those which are disclosed on the sale sheet, and which have been mentioned by Mr. Justice Ainslie and so far as these go, it seems to me that the respondent was not the purchaser at the first sale, though no doubt a full enquiry into the matter might possibly show that he was.

The view which I take as to the process of an auction sale may be shortly described as follows:—All the terms of the contract, which is to be the contract of sale, excepting the price, are proposed by the vendor in the conditions of sale; and these are tacitly agreed to by every one who makes a bid.

The term as to price is negotiated (so to speak) and settled by the bidding, during which each bidder in succession offers on behalf of an intending purchaser a particular price.

That offer is accepted by the vendor, which was highest at the moment when the auctioneer's hammer fell; and the person *on whose behalf* the bid was made thereupon became the purchaser on the contract of sale which is constituted of the conditions of sale and the accepted bid, unless, only, some valid reason exists, why the auctioneer should not accept that person as purchaser, and does, in fact, refuse to do so.

The ordinary course is for the bidder, to whose bid the property was knocked down, immediately to announce the person on whose behalf the bid was made by him, if he does not expressly say that the bid was made for some person other than himself, it must be taken as against him that he did, in fact, bid on behalf of himself.

At this stage, it is the duty of the auctioneer to declare and to record in writing who was the purchaser, and Act VIII of 1859 evidently as it seems to me contemplates that he should do so. If for any good reason he does not accept as purchaser, the person named by the highest bidder as his principal, he cannot make the bidder himself purchaser against his will. He must simply declare that no sale has been effected and re-open the bidding. I will here say that I think it would be good reason for not accepting the named principal, that the bidder did not, when called upon to produce a sufficient authority of agency from him.

In the case where the person named by the highest bidder is accepted as purchaser, the contract and parties to it are, I apprehend in the same predicament as if all the terms including the price had, at the outset, been put into writing, and it had further been written down that the person, who made the highest bid, effected that contract with the vendor for and as agent of the person, whom he named as his principal, and not on behalf of himself. And on such a contract as this supposed, the person who acted as agent could not be treated as the principal contracting party, *merely because* it in the end turned out that he had, in fact, no authority to bind his alleged principal, though no doubt he might, on this ground, be made responsible in damages.

In order to convert a person who appears on a contract as agent, into principal, there must, I think, be dishonesty on his part, in regard to his assumption of the character of agent. Such for instance as would be the case, if he really made the contract for himself, though he pretended to be an agent only—or if he knew he had no authority to bind the alleged principal and had no reason to expect that the contract would be ratified by him, and so on.

In the present case, it appears to me from the sale sheet, that Hurpershad held himself out as agent only, for one Mussamut Deorane Kowar and that the Judge accepted Mussamut Deorane Kowar as

purchaser on his bid; had the Judge not done so, he would not have mentioned the Mussamut's name in the sale sheet at all, and would have re-opened the bidding. If it is said that the Judge conducting the sale, wrote down Hurpershad's statement that he had effected the purchase in the interest of the Mussamut, merely in order that by so doing he might prevent disputes under Section 260 of the Procedure Code, it seems to me that the whole point is conceded, for that Section enacts that "The certificate shall state the name of the person who at the time of sale is declared to be actual purchasers, &c." This must mean declared by the selling officer, and it accords with this view that in Section 253 it is enacted, "the party who is declared to be the purchaser shall be required to deposit immediately, &c." With the greatest difference, then, to the views of my colleague, I cannot avoid the conclusion on the facts before us that the Judge declared Mussamut Deorane Kowar to be the purchaser by the agency of Hurpershad.

On this state of facts, when it became necessary to have a second sale, and to call upon the purchaser at the first sale to make good the consequent difference of price under the terms of Section 254 of Act VIII of 1859, it seems to me that the Mussamut was the apparent first purchaser, and therefore the person to whom recourse should first have been had. She ought to have been called upon to show cause why an order for the payment of this difference should not be made upon her. Then in the event of her showing good cause, or even without making any formal application against her, if he had reason to be satisfied that she was not in fact the purchaser, the judgment-creditor might proceed against Hurpershad: but the proper mode of doing so, would be, I think, by an order from the Judge calling upon him, on the foundation of the Mussamut's repudiation of the contract to show cause, why she should not be treated as principal party to it, and an order on him to pay the difference of price under Section 254. I may here remark that in my opinion, process of execution could not in any case rightly issue against the defaulting purchaser for the difference of price, which is leviable from him under the terms of Section 254, until an order for payment of that difference has been made upon him, and no such order could rightly be made upon him

without affording him an opportunity of showing cause against it. For it seems to me that until such an order for payment is made, there is nothing which can be executed, and it is only common justice that a man should be heard or have an opportunity of being heard before an order for payment of money should be made against him.

I confess I am unable to understand the apprehension of fraud which has been in some degree introduced as an element of consideration in this case. The selling officer must, I suppose, have this matter always pretty much under his own control; for he need never declare an absent person purchaser unless he is perfectly satisfied, at the time of sale, with the credentials, which the agent produces. If he is not so satisfied, he may either give the bidder the option of being declared purchaser himself, or re-open the bidding.

On the facts which are before us it seems to me, after the best consideration which I can give to them though with the hesitation which the contrary opinion of Mr. Justice Ainslie necessarily inspires, that the Judge was right in refusing the judgment-creditor's application for execution against the respondent, and that consequently this appeal ought to be dismissed.

If the judgment-creditor on this application had satisfied the Judge that Mussamut Deorancee Kowar had repudiated the contract, then I think the right course would have been for the Judge to have called upon the respondent to show cause why he should not be treated as actual purchaser, and an order made upon him accordingly for the difference of price, and there is nothing in the dismissal of this appeal to prevent this course being taken.

*Mr. Justice Ainslie.*—On the 25th November 1870, certain property was put up to sale in execution of a decree obtained by the present appellants. The highest bid was Rs. 700, and was made by the respondent, and the property was knocked down to him at that price. On the conclusion of the sale he signed the sale sheet as follows:—Hurspershad Mokhtar purchased for Mussamut Deo Rane Kowar, &c.

The sale sheet is then countersigned by the Judge in the following terms:

Lalla Hurspershad Mooktar *having made the purchase* for Rs. 700 stated that he had made the purchase for Mussamut Deorancee Kowar

## ORDERED

That the *auction purchaser* do at once pay the earnest money into the Collector's Treasury, and then put in the Challan."

P. S. C. B.

Accordingly the earnest money was paid in, but the balance of the purchase money was not paid in as required by Section 254 of Act VIII of 1859, and the property was resold for Rs. 60. The decreeholder subsequently applied to the Court, under the Section referred to, for the levy of the difference from the first purchaser.

The words of the Section are—"If the proceeds of the sale which is eventually consummated be less than the price bid by such defaulting purchaser, the difference shall be leviable from him under the rules for enforcing the payment of money in satisfaction of a decree of Court."

The judge's order on this application is as follows:—"This (*i. e.* execution) must first be issued against the principal and not against the Mookhtar, who was merely his agent at the sale. The case is, therefore, struck off."

The decreeholder has appealed urging that there is nothing to show that the respondent was acting under authority granted by Deo Rane Kowar that he did not disclose that he was acting for any one but himself till the sale was concluded, and that Deorancee Kowar is a person of no means.

It is clear that the respondent had no authority in writing from his alleged principal and that he did not, while the bidding was going on, or until the lot was knocked down, intimate to the Judge that he was not bidding on his own account; and it is, I think, clear from the terms in which the Judge subscribed the sale sheet that he did not recognize Deorancee Kowar as the purchaser, although in accordance with a very common practice, adopted to prevent disputes under Section 260, he allowed the respondent to record that he had effected the purchase in the interest of Deorancee Kowar.

It seems to me that the Court would not have been justified in declaring on the bare allegation of Hurspershad, unsupported by any voucher, that Deorancee Kowar was the person responsible for the payment of the purchase-money, and further that the Judge was bound to secure the interests of the judgment-creditor in the mode prescribed

by the law by recording the name of the purchaser against whom proceedings could be taken, as in execution of a decree, in the event of a default in making good the full amount of the purchase-money.

Two courses were open to the Judge. One was to refuse Hursershah's bid and go on with the sale, as if that bid had not been made, as soon as he found that he professed not to be acting on his own account, and failed to show authority to act for Deoranee Koowar. The other was to hold Hursershah to be, what at the time when the hammer fell he appeared to be, *viz.*, the actual purchaser. He elected the latter course, and I think he was quite right in doing so.

It appears to me that the concluding clause of Section 254 creates a wide distinction between auction sales held under the Act and common auction sales in which the auctioneer is merely the servant or agent for the time being of the owner of the property to be sold, voluntarily selected by him. This clause gives a summary remedy as by execution of a decree, and I think that this must be taken to be against a known person, and that it cannot be left to be determined afterwards who the real judgment-debtor is. The Judge has by his order thrown upon the decreeholder the burden of proving by an informal sort of suit, analogous to nothing that I am acquainted with as a proceeding authorized by the Code of Civil Procedure, that some party other than the judgment-debtor on the record ought to be substituted for that judgment-debtor, not on the ground that such other party has succeeded to the place of the debtor since the making of the decree, but on the ground that the decree ought to have been made in the first instance against such party and not against the debtor on the record.

It is not necessary to enquire whether Deo Ranee Koowar has meant to make good the difference between the prices bid at the first and second sales, it was not on her credit that the lot was knocked down at that time, neither the Court or the judgment-creditor had reason to suppose that they were dealing with any one except Hursershah, and it seems to me that the creditor is entitled to recover from him in the mode prescribed by the law, and is not to be left to proceed first against Deo Ranee, and then if those proceedings are ineffectual by a regular suit against Hursershah for the unrealized balance.

The proceeding adopted by the Judge opens the door to endless fraud—nothing would be easier than to put up the name of a mere dummy as the real purchaser and to prove with his (or as it generally would be, her) connivance that he was the real purchaser, so as to defeat entirely the provisions of Section 254. Of course, if the terms of the law are clear, the inconveniences arising from following them, would be no argument for deviating from them but if there is room for doubt, I think, we are justified in looking to consequences in order to form a conclusion as to the intension of the Legislature. In this case it seems to me that the letter of the law is consistent with what appears to be expedient.

I am of opinion that the order of the Judge ought to be set aside, and that we ought to direct him to allow execution to proceed against the respondent, this appeal being decreed with costs.

*Judgment of the Lords of the Judicial Committee of the Privy Council on the appeal of Rajah Debendro Narain Roy vs. Coomarr Chunder Nath Roy, from the High Court of Judicature at Fort William in Bengal; delivered 4th April 1873.*

*Present :*

SIR JAMES W. COLVILLE,  
SIR BARNES PEACOCK,  
SIR MONTAGUE E. SMITH.  
SIR ROBERT P. COLLIER.

When a property was sold in satisfaction of decrees which had been recovered affecting the property, the proceeds of sale being paid in the usual way into the Collector's office; and there applied among the decreeholders, some of whom most unquestionably had subsisting and valued claims against the estate of the last full owner, the sale could not be held to have conveyed only the life interest of his widow, although the sale was had under an attachment issued in the suit of certain mortgagees whose lien appears to have been created during her possession of the estate.

It is not necessary for their Lordships to express at any length the grounds on which they think that this appeal must be dismissed. The plaintiff comes into Court to follow into the hands of the defendant, who by intermediate transfers has acquired the title of the purchaser at an auction sale, which took place so long ago as the 10th June 1848, the property which was then sold. The grounds upon which he does this are, that the late Rajah Shib Prossad Roy, who died some time before the sale was the



undoubted owner of the property, that Rajah Shib Prosad Roy left an unnoomuttee puttro, by which he authorised his widow to adopt a son; and that in the year 1856, then more 12 years after the sale, she exercised that power in favor of him, the plaintiff. However, nothing turns upon the point of time. His contention is that the sale must be taken to have been a sale of merely the widow's interest, and that upon her death, in the year 1865, his interest for the first time accrued, and that he was therefore entitled to commence this suit for the purpose of recovering the property in July 1868. The nature of the unnoomuttee puttro was peculiar, in that it did not leave the widow's estate to be defeated immediately by the adoption, as in the ordinary case, but gave to her in the event of an adoption, a life interest in the property. Hence the interest of the appellant did not commence until the widow's death.

If this suit were successful, it certainly would be a flagrant instance of the extreme inconvenience which arises so often from the limited nature of a Hindoo widow's estate, and from the confusion which is introduced into the devolution of estates by authorities to adopt, which for a considerable time are not acted upon. But, of course, if the facts supported the contention of the appellant, it would be their Lordship's duty to apply the law without regard to such inconveniences or to the hardship upon the purchaser at the execution sale, and those who claim under him. It appears, however, to their Lordships that in this case there are no reasons whatever why they should apply that harsh law. If the only execution under which the property was sold, and the only liability which the proceeds of the sale were applied to satisfy, had been that incurred after the death of the Rajah Shib Prosad Roy, in the proceedings taken ineffectually to contest the foreclosure of the mortgage, and the recovery of the mortgaged property, it might still be a question whether that were not a liability which bound the inheritance, inasmuch as it was incurred by the Court of Wards as representing the whole estate, and with the *bona fide* object of protecting the whole estate. It does not seem, however, to their Lordships, to be necessary to rest their decision upon that ground, since the view taken in the able judgment of the High Court affords a more satisfactory

ground upon which to place it, that ground being that the property had, in fact, been also attached in satisfaction of decrees for other debts for which the estate of the Rajah was beyond all question liable; and that although the sale was had under the attachment issued in the suit of the mortgagees, the property was, in fact, sold in satisfaction of all the decrees that had been recovered affecting the property, the proceeds of the sale being paid in the usual way into the Collectorate, and there applied among the decree-holders, some of whom most unquestionably had subsisting and valued claims against the estate of the Rajah.

Under these circumstances, their Lordships fully concur with the High Court in thinking that the appellant has no substantial ground upon which he can impeach the long title acquired by the respondent under the execution sale. It is, therefore, wholly unnecessary for their Lordships to consider whether the evidence supports the conclusion of the High Court upon the question, whether Anund Moyee Dabee had abandoned the world before her death, or whether the Court of first instance was correct in holding that that case had not been established.

Their Lordships must humbly advise Her Majesty to affirm the decree under appeal, and to dismiss this appeal. The costs, of course, ought to follow the result.

THE 9TH APRIL, 1873.

*Present:*

The Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice*, and the Hon'ble F. B. Kemp, Louis S. Jackson, J. B. Phear, A. G. Macpherson, W. Markby, F. A. Glover, Dwarkanath Mitter, W. Ainslie, and C. Pontifex, *Judges*.

CASE NO. 1870 OF 1870.

*Special Appeal from a decision passed by the Deputy Commissioner of Seesagur, dated the 1st June 1870, reversing a decision of the Moonsiff of Golaghat, dated the 24th March, 1870.*

Kerry Kolitane, (defendant) *Appellant*,

*versus*

Moneeram Kolita, (plaintiff) *Respondent*.



*For Appellant.*—Baboo Mohinimohun Roy.

*For Respondent.*—Baboos Kalee Prosunno Dutt, Kalee Mohun Doss, and Nullit Chunder Sen.

Held, (by Cough, C. J., Jackson Phear, Macpherson Markby, Pontifex and Ainslie J.J.) that under the Hindu law prevalent in Bengal, a widow having inherited the estate of her husband is not liable to forfeit it by reason of unchastity, Kemp, Glover and Mitter J.J. dissenting.

It appears that Moneeram Kolita sued to recover possession of certain properties, held by Kerry Kolitance, defendant, as heiress to her late husband, on the ground that she had forfeited her right to retain possession of them by reason of her incontinence, he, plaintiff, being the first cousin and consequently the next heir of her husband. The Moonsiff of Golaghat dismissed the claim. On appeal the Deputy Commissioner of Seeksagur decreed the plaintiff's suit. The defendant accordingly preferred a Special Appeal which came on for hearing before Justices Bayley and Mitter and their lordships referred the case to a Full Bench, by an order dated the 10th April 1872, with the following observations:—

“*Mr. Justice Mitter.*—The first question we have to determine in this case is whether under the Hindoo law, as administered in the Bengal school, a widow who has once succeeded to the estate of her deceased husband, is liable to forfeit that estate by reason of unchastity.

“In order to arrive at a satisfactory solution of this question, we thought it proper to consult some learned Pundits in Court; and we, accordingly, summoned Pandit Issur Chunder Vidyasagur, Pandit Mohesh Chunder Nyaruttan, Officiating Principal of the Calcutta Sanscrit College, Pandit Bharut Chunder Shiromony, Professor of Hindoo Law in the said institution, and Pandit Tara Nath Turkobatchusputee, Professor of Grammar and Rhetoric in the same. Pandit Issur Chunder Vidyasagur, however, could not attend on account of ill-health. The other three Pundits appeared, and orally stated unanimously that the question under our consideration ought to be answered in the affirmative, each giving his separate opinion, and the authority on which it rested, also orally.

“In this opinion we entirely concur. All the ancient rishis or sages, whose works are recognized as authorities in the different schools of Hindoo law current in the coun-

try, appear to be unanimous in holding that an act of unchastity is one of the gravest delinquencies of which a woman can be guilty; and hence it is that we find in the Hindoo shasters so many stringent provisions for its prevention:—

“‘Day and night (says Menu) must women be held by their protectors in a state of dependence; even in lawful and innocent recreations being too much addicted to them, they must be kept by their protectors under their own (dominion.)’ (Colebrooke’s Digest, Lon. Ed., vol. 2, p. 379.)

“‘Through independence (says Nareda), even women of noble families would swerve from their duty. Hence the Lord of created beings has established their perpetual dependence.’—(Colebrooke’s Digest, vol. 2, p. 380.)

“‘Let her father (says Yajnavalkya) guard a maiden, let her husband guard a married woman. But let her son guard her in age, or on failure of these, let her kinsmen protect her. In no instance is the independence of women allowed.’—(Colebrooke’s Digest, vol. 2, p. 381.)

“‘Women (says Menu again) must above all be restrained from the smallest illicit gratification; for not being thus restrained they bring sorrow on both families. Let husbands consider this as the supreme law ordained for all classes; and let them, how weak soever, keep their wives under lawful restrictions. For he who preserves his wife from vice, preserves his offspring from suspicion of bastardy, his ancient usages from neglect, his family from disgrace, himself from anguish, and his duty from violation.’—(Colebrooke’s Digest, vol. 2, p. 382.)

“‘A woman (says Vrihasputte) must be carefully guarded by her mother-in-law and other venerable matrons.’—(Colebrooke’s Digest, vol. 2, p. 384.)

“‘If the husband’s family be extinct (says Nareda again), or the kinsman be unmanly, or destitute of means to support her, or if there be no sapindas, a kinsman on the father’s side shall have authority over the woman. But if the kindred on both sides fail, the king is considered as the protector of the woman; he shall guard her, and shall chastise her if let away from the path of virtue.’—(Colebrooke’s Digest, vol. 2, p. 384.)

“‘Therefore, guard wives (says Paithinusi), lest mixed classes should spring from them.’—Colebrooke’s Digest, vol. 2, p. 383.)

## THE PURNEAH CASE.

(Before the Hon'ble F. B. Kemp and the  
Hon'ble J. B. Phear, Judges.)

RULES NOS. 666, 704, AND 740 OF 1873.

IN THE MATTER OF MOONSHEE SYUD ABDOL  
KADIR KHAN, Petitioner, vs. THE MAGIS-  
TRATE OF PURNEAH, Opposite Party.

Mr. M. Ghose and Baboo Boodh Singh for  
the Petitioner.

The Legal Remembrancer for the Opposite  
Party.

1. By Section 297 read with Section 64 of the Criminal Procedure Code, the High Court is authorized to take cognizance of and revise proceedings before a Magistrate while they are still in the interlocutory state of pending investigation.

2. The High Court is empowered by Clause 1, Section 297 of the Criminal Procedure Code to pass such judgment, sentence, or order thereon as it thinks fit; and it must in any case at least be fit and proper that the High Court should give the Magistrate such directions to his action as will lead him to do that which he ought to have done without the direction of the said High Court.

3. The High Court has the power to interfere with the Magistrate's proceedings without having the record of any case before it.

4. The purpose of a warrant of arrest is fulfilled when the prisoner is brought before the Magistrate who issued that warrant, or any other Magistrate qualified to act for him; and, further, that it is the duty of the person who receives the warrant, and is charged with its execution, to bring the prisoner before the Magistrate without any unnecessary delay.

5. When a prisoner is arrested under a warrant, he should be brought promptly before the Magistrate, and the Magistrate has then no authority to further detain him in custody or to remove him to prison without some reason made manifest to him, either in the shape of sworn testimony given before him, or in some other form which can be put upon the record, and which is sufficient to justify him in sending the prisoners to prison, there to be detained for a limited period before further examination,—a period which is never to exceed fifteen days.

*Phear, J.*—Three rules, which were issued by this Court on the 12th, 19th, and 28th of last month, respectively, in the matter of Abdool Kadir Khan, have come before us to be adjudicated upon and disposed of. Before, however, I state the exigency of those rules, I will mention a few preliminary facts.

In 1870 and 1871, or during a portion of those years, Abdool Kadir Khan was officiating head clerk of the Purneah Collectorate in the place of one Rooddro Chunder Mullick. Rooddro Chunder Mullick appears to have resumed his duties somewhere towards the end of the year, and shortly afterwards preferred three charges of embezzlement and two of forgery against Abdool Kadir Khan. These charges were enquired into by Mr. Weeks, who was at that time the Joint-Magistrate of Purneah, and dismissed by him. This occurred in November 1871. Subsequently, however, the Sessions Judge took up the matter, and directed the Magistrate to

commit Abdool Kadir Khan for trial upon these charges, and pursuant to this direction of the Judge, Mr. Wyer, who then had succeeded Mr. Weeks as Joint-Magistrate, issued a warrant of arrest, and Abdool Kadir Khan was arrested under that warrant, I think, in October 1872, and was committed for trial. He was tried at the Sessions Court, and convicted on the 13th of January 1873. He was then sentenced by the Judge to 10 years rigorous imprisonment, and to pay a fine of 1,000 Rs., or, in default of payment, to suffer rigorous imprisonment for a further period of two years.

After Abdool Kadir Khan had been committed for trial by Mr. Wyer, Mr. Kemble, who was then, and still is, Officiating Magistrate and Collector of Purneah, wrote a letter on the 30th of December from himself as Collector to himself as Magistrate. The letter runs in these terms :

"To the Magistrate of Purneah.

"Sir,—I have the honor to forward to you herewith in charge of my head clerk, Baboo Sreenath Banerjee, the following papers connected with the late embezzlement by Syud Abdool Kadir Khan at present in custody in the Purneah jail, and who will be now charged with further embezzlement. I shall be obliged if you will issue warrant for his arrest in case he should not be convicted on the charges on which he is to be tried on the 6th proximo.

"The papers named above are ;

"1st, An abstract, marked A, drawn up by Mr. Worgan, dated February 27th, 1872, showing that Abdool Kadir, between September 1870 and May 1871, cashed certain bills as sub-divisional contingent and income tax bills for larger sums than were billed for by the sub-divisional officers, and remitted to those officers the smaller amount only. This charge will be proved by the bills cashed, the copies of the original bills from Kishengung, and the copy (*sic in or.*) bill book from Arrariah, and by the covering letters and the cheque register, all of which are sent. These papers will show that fraud has been committed, and my head clerk is instructed to prosecute Abdool Kadir, who cashed these bills, under section 409 or other cognate sections.

"3rd. With reference to item 9 in Mr. Worgan's list, a charge of forgery will also be laid, as the original bill for Rupees 52-5-7 was not in this case destroyed, but was altered

to Rupees 76-5-7 by manifest erasures. This charge will fall under Chapter XVIII. of the Penal Code.

"4th. Any of my officers will be ready at any time to attend your Court to prove the documents now filed."

We have been informed that the schedule or papers annexed to this letter contain as many as 24 distinct items of charge.

Mr. Kemble, the Magistrate, having been in this way informed by Mr. Kemble, the Collector, of the fact of a criminal offence having been committed by some one within his jurisdiction, took cognizance of it, and having been further led, I suppose, by the same means, to suspect that Abdool Kadir was the offender, he dealt with the matter as Magistrate under section 142 of the present Procedure Code, and then made over the case for enquiry to Mr. Wyer, the Joint-Magistrate, and the result was that Mr. Wyer committed Abdool Kadir for trial on three out of the 24 charges mentioned or referred to in the letter. I feel myself obliged to say, in passing, that this really seems to me a very pitiful effort at disguising the fact that Mr. Kemble was in this matter the real prosecutor in his capacity of Collector, the prosecutor of Abdool Kadir Khan upon the charges contained in the letter of the 30th of December; and it would have been much more straightforward, to say the least of it, if he had frankly avowed himself prosecutor, and laid a complaint before the Joint Magistrate in the usual manner. Abdool Kadir was tried upon these charges, and convicted by the Sessions Court on the 11th of March 1873; and was further sentenced, in addition to the sentence I have before mentioned, to a term of 7 years' rigorous imprisonment. Against the convictions and sentences of the 30th of January and 11th of March respectively, the prisoner appealed to this Court, and was acquitted in the one case on the 25th of April, and in the other case on the 26th of the same month. An order for his immediate discharge from custody, so far as imprisonment under these convictions and sentences was concerned, was at once sent down to Mr. Kemble, the Magistrate of Purneah, who appears to have received the order on the afternoon of the 28th April. The Magistrate did not, however, promptly release the prisoner. Before taking any steps towards doing so, on the 28th, in his capacity of Collector, he sent a letter to Mr.

Wyer, the Joint-Magistrate, which runs thus:—"Sir, as I hear that Abdool Kadir has been released by the High Court from the sentence recently imposed on him by the Sessions Court, I have the honor to request that you will go on with the other charges noticed in my letter No. 1933, dated 30th December 1872, to the address of the Magistrate. I have the honor to be, &c."

Upon this letter is endorsed by Mr. Wyer:—"A warrant will at once issue against Abdool Kadir Khan under section 409, and be given to the Court Inspector to be served." It also appears that on the same day Mr. Wyer issued a formal warrant according to the terms of this endorsement. This having been done, Abdool Kadir Khan was brought up from the jail before Mr. Kemble as Magistrate, and then told of his acquittal by the High Court, and of the order for his release from jail. Mr. Kemble also at the same moment turned round to the Court Inspector who was present, I need hardly say, not by accident, and said to him: "Has Mr. Wyer given you a warrant?" The answer was in the affirmative. Mr. Kemble then said: "Take him back to jail," and back to jail Abdool Kadir was taken. No warrant of commitment to jail or written order of remand was made out, nor was the prisoner taken before the Magistrate, who had issued the warrant of arrest, according to the exigency of the warrant. This is on the 28th; on the 29th the Court Inspector becoming, probably not without good reason, a little anxious that a written warrant of commitment should be made out, endorsed upon the original warrant of arrest this memorandum:—"Sir,—Yesterday at 6 p.m. prisoner Syud Abdool Kadir was released by order of the High Court, Calcutta. At the moment he was under this warrant arrested, and by order of the Magistrate of this district, sent to hajut. But owing to the lateness of the hour the purwanah for hajut was not sent. By this report, therefore, I beg to solicit that an order may be passed by the hazoo for giving a purwanah for hajut regarding the said defendant." Mr. Wyer endorsed under this the same day: "That a purwanah for hajut be given, and that the record in the matter of Abdool Kadir, made over by the Magistrate, be, by a proceeding, sent for from the Sessions Judge;" and there is further endorsement to the effect that:

proceeding had been sent. This, I understand, is the endorsement which constituted the written order of commitment. On the 1st of May the Joint-Magistrate issued a further order in this matter. It seems that on that date Mr. Kemble wrote to Mr. Wyer in these terms: "With reference to the case of Abdool Kadir Khan now pending before you, I have the honor to request a postponement for one week until I receive the judgment of the High Court in the cases previously decided." It does not appear that the prisoner was at this time brought before Mr. Wyer, or indeed that he was taken from prison before any Magistrate after the verbal commitment of Mr. Kemble on the 28th of April until the 8th May, a date to which I shall presently come. Mr. Wyer endorsed upon this application for adjournment made by Mr. Kemble: "The case will be postponed to the 8th;" and on the same day he made out a formal order of remand until the 8th of May. It must be remembered that up to this time no evidence whatever had been taken, and we have not been made aware that there were any reasonable grounds or any ground whatever for a remand other than the letter of Mr. Kemble written to Mr. Wyer, which I have just now read; and I suppose that the sole reason, the only ground, upon which the Joint-Magistrate detained the prisoner in *hajut*, was the ground afforded by such suspicion as was lurking in his mind in consequence of the original letter sent by Mr. Kemble to him on the 28th of April, strengthened, if it is possible to conceive it to be strengthened, by this letter of Mr. Kemble written to him on the 1st of May, asking for an adjournment. It is perhaps not to be wondered at that in this state of things the prisoner desired to see the warrant of arrest, in order to ascertain, if possible, the offence with which he was charged, and the matter for which he was held in custody. He accordingly petitioned Mr. Wyer for a copy of the warrant of arrest. This application was refused. He then petitioned Mr. Wyer to let him have a copy of the order of the refusal. This application also was refused. He then made an application to be admitted to bail, not altogether an unreasonable one, considering that several days had already passed, and yet from the first no evidence whatever had been taken, and indeed no specific accusation or charge made against

him. This application was again refused. Abdool Kadir then applied to this Court by petition upon the foundation of the material fact which I have just been relating, set forth in an affidavit and upon this petition and affidavit the rule of the 12th of May issued, which, in substance, directed that the record and processes and papers in the case should be sent up to this Court, that the proceedings in the matter should be stayed in the Magistrate's Court until further order of this Court, and that in the meanwhile the prisoner should be released upon certain security, (which was specified in the rule) for his appearance in the Magistrate's Court, when called upon. This rule, I believe, reached Mr. Kemble on the 14th of May. The Magistrate acted upon this rule so far as to admit the prisoner to bail upon recognizances conditioned for his appearance every day in the *cutchery*. At the same time the Magistrate wrote a letter to the District Superintendent of Police in these words: "Sir, Abdool Kadir has just been released by orders of the High Court on bail of Rs. 500 only. I think it extremely probable that he will try to escape, and forfeit his bail. I therefore request that you will instruct the police to watch his movements and to report to me if he should be discovered leaving *Purneah*. He is bound to present himself to me every morning." Upon entering into the recognizances conditioned in this manner, Abdool Kadir was released. The next day, the 15th, he presented himself at the *cutchery* in obedience to the terms of the security bond, and Mr. Kemble, as I understand, then directed that he should be taken into custody by his *nazir*. The *nazir* accordingly arrested him, detained him in his personal custody all day, and finally Mr. Kemble ordered that he should be taken to the civil jail, and confined there. He professed to do this of his own authority as Collector under the provisions of Regulation XVIII of 1817. No evidence was then taken, nor, I believe, was any evidence taken in the presence of the prisoner at any time during the period of his incarceration in the civil jail, which continued for seven days. Not unnaturally the prisoner Abdool Kadir did not consider this behaviour of the Magistrate towards him as amounting to a complete carrying into effect of the orders of this Court, given in the rule of the 12th of May, which among other things,

certainly directed that he should be released. So he presented a second petition, fortified by an affidavit, to this Court, and on the 19th of May a second rule was issued, calling upon Mr. Kemble to show cause why he did not carry out the order of this Court, which was involved in the rule of the 12th of May. Before this second rule reached Mr. Kemble, he had, it seems, been informed by the Commissioner that the imprisonment of Abdool Kadir in the civil jail was altogether illegal, because the regulation under which he professed to act had been repealed, and he was instructed by the Commissioner to lay a complaint in his own person against Abdool Kadir before the Magistrate, and to proceed in the regular way for the prosecution of that complaint. He therefore released the prisoner from the civil jail on the evening of the 21st of May. On the 22nd he made a complaint on oath before the Joint-Magistrate, Mr. Wyer, upon the footing of which Mr. Wyer issued a warrant of arrest, and Abdool Kadir was the same day again arrested upon the charges which were supposed to be embodied in this last-mentioned complaint of Mr. Kemble. Upon this arrest a remand order was made out, by which he was committed to hajut, to appear again before the Magistrate on the 30th of May; but it has not been shown to us that there was any evidence, and I believe I may take it that there was none, upon which this order of remand to prison was made out. The prisoner then prepared a third petition to this Court, representing the fact which I have just mentioned by affidavit, and a third rule was issued to Mr. Kemble on the 28th of May, requiring him to send up the record of this second case, as well as the first, and to release the prisoner upon bail of himself 1,000 Rs. and two sureties of 500 Rs. each. In the meanwhile Mr. Kemble had made a second deposition before Mr. Wyer, not in the presence of the prisoner, the purpose of which it is not easy to apprehend, unless it was to make an original complaint, upon which the prisoner had been already arrested, namely, on the 22nd May, more clear and more complete than it was before. Afterwards, again, Mr. Kemble corrected both these depositions by what I may term a letter of appendix written to Mr. Wyer, and I believe that that letter has been placed upon the record by Mr. Wyer. Thus it has

come about that the three rules which I first mentioned have been issued by this Court to Mr. Kemble, and are now before us for adjudication.

I will now return to the matter of the first rule. The learned Legal Remembrancer objects that the rule was issued by this Court without jurisdiction. He has put his objections very clearly in a detailed form, but I think I may group them somewhat, and say that they substantially amount to, 1st, an objection that this Court has no jurisdiction to revise the proceedings of a Magistrate while they are in an interlocutory state; 2nd, that it has no jurisdiction to suspend such proceedings either at all, or at any rate without having the record before it; and, 3rd, that it has no jurisdiction in such a case to order bail to be taken, because the Sessions Court has exclusive jurisdiction in that matter by virtue of section 390 of the Criminal Procedure Code, and also because in this particular case circumstances justifying the release of the prisoner on bail did not exist, the offence with which he is charged being, according to his own admission, a non-bailable offence, and the conditions of section 398 not being satisfied. Now, it appears to me that section 297 of the Criminal Procedure Code furnishes an answer to all these objections. The first clause of that section is as follows: "If in any case either called for by itself, or reported for orders, or which comes to its knowledge, it appears to the High Court that there has been a material error in any judicial proceeding of any Court subordinate to it, it shall pass such judgment, sentence, or order thereon as it thinks fit." If that clause stood alone, clearly it would exhibit no limitation whatever in regard to the stage of the judicial proceeding, in which power is given to the Court to call up and revise these proceedings. The learned Legal Remembrancer argues, however, that the remaining clauses of that section, inasmuch as they are all directed to cases where there is a record, and where a final order or an order which in some sense may be taken as a final order has been passed, must be construed by implication to put a limitation of the kind which he contends for, upon the general words of the first clause. It seems to me that we should be wrong in coming to a construction of this sort, even looking upon the words of section 297 alone; but when further we have regard

to section 64, which gives this Court the power, whenever it appears to it that its order will promote the ends of justice, and so on, to "direct the transfer of any particular criminal case or appeal, or class of cases or appeals, from a Criminal Court subordinate to its authority, to any other such Criminal Court of equal or superior jurisdiction, or may order that any offence shall be *enquired into* or tried in any district or division of a district, other than that in which the offence has been committed, or that it shall be tried before itself," when we have regard, I say, to these provisions of section 64, it is quite clear, I think, that the Court must have power to take cognizance of and revise proceedings before a Magistrate while they are still in the interlocutory state of pending investigation, for otherwise there would be no reason why the Legislature should in this way give the Court express power to remove a case from one tribunal to another for the purpose of carrying on or continuing the investigation of it. I believe that the objection of the learned Legal Remembrancer on this point is made now for the first time, and at any rate the Court has since the date when this new Criminal Procedure Code came into force, been almost daily, I may say, acting upon the general power of revision which hitherto has been supposed to be conveyed by this first clause. And if it has power by this clause, as it seems to me clear that it has, to call up to itself proceedings while they are in the condition of the preliminary stage of investigation for the purpose of correction, and of giving proper directions for the conduct of the investigation, it must be incidental to that power that the Court should be able to suspend the proceedings, for it would be a manifest absurdity to my mind that the Court should be empowered by the Legislature to call up the record and the proceedings in a case for the purpose of looking at them, revising them, correcting material error, and putting them upon a proper footing of investigation, but yet that the Court should have no power to stay the proceedings of the Subordinate Court which require to be set right. It is no doubt a very forcible objection on the part of the learned Legal Remembrancer that a step of this kind should not be taken by this Court without inspection of the record, and I readily concede this much to him, namely,

that the Court ought not in any except extreme cases to interfere with the Magistrate's proceedings until it has the record before it. But I entirely deny that it has not the power to do so. If the Court were altogether unable to take such a step without having the record before it, the non-existence or non-production of a record would really effect a nullification of this Court's powers of revision in some cases which I could mention, and which by their nature would be cases in which it was most necessary that this power should be exercised. In this very case which is now under our consideration, before the day when Sreenath Banerjee was examined as a witness, there was nothing which could be called a record and if the Magistrate chose to allow that state of things to go on, and to keep the prisoner in custody without, in fact, taking any proceeding whatever, the result would be that while the unfortunate prisoner might be illegally detained in jail for months, there would be no material in the shape of a record to be put before the Court, upon which its action could be invoked. And yet obviously such a case as that would be one which would more require the intervention of this Court for the purpose of furthering the ends of justice than almost any other which could be instanced. In truth, the absence of anything to record might afford the strongest possible ground for the interposition of this Court. But it further seems to me that the words of section 297 entirely dispose of this question. By them the Court is expressly empowered to pass such judgment, sentence or order as he thinks fit in any case called for by itself (*i. e.*, where the record is sent for), or which *comes to its knowledge*; and this last must, I apprehend, be any case the facts of which are brought to the knowledge of the Court in any sufficient manner, whether by the record or otherwise. It is, however, I need hardly say, a rule of the Court not to suspend proceedings, and not to issue final orders to a Subordinate Court until it has the facts manifested to it in the most sure and certain shape, namely, the shape which the record itself affords, if possible, and nothing is more common when the summary interposition of this Court is invoked, than for this Court, in the first instance, to say we can only at this stage send for the record, and when the record comes before us we shall see how the

facts stand. But as I remarked during the course of the argument, the present case seemed to us a very exceptional one. We had facts before us positively sworn to, with regard to which it was not likely that perjury would be committed; and if these facts were accurately stated, they were such as rendered it incumbent upon us at once without delay to afford the petitioner the relief which he asked. It turns out that these facts were perfectly accurate, and I will take the opportunity here to say that the representation of facts which has been made to this Court on the three different occasions by Abdool Kadir Khan in these several petitions, and in the affidavits made on this behalf, have proved, in our judgment, to be throughout most fair, most candid, and most accurate; and I think, at any rate, in the final disposal of these rules, he ought to have such benefits as he can properly derive from the truthful attitude which he has taken up in this matter. I do not think it is necessary for me to add further reasons why, if we have the power to bring up these proceedings, we must also have the power to suspend action in the Court below pending our enquiry. We come to the third objection of the Legal Remembrancer, to the effect that the order directing the Magistrate to admit Abdool Kadir to bail was made without jurisdiction. I find the answer to that objection in the same clause of section 297 which I have already referred to. This Court is empowered by that clause to pass such judgment, sentence, or order thereon as it thinks fit; and it must, in any case at least, be fit and proper that this Court should give the Magistrate such directions to his action as will lead him to do that which he ought to have done without the directions of the Court. Now unquestionably at the time when the order to admit to bail was sent down by this Court, although it is said the offence of which Abdool Kadir was accused was a non-bailable one, the Magistrate had power to remand the prisoner, and during the period of remand to admit him to bail; in fact, as matters were represented to us, and as they now stand unimpeached, it was his duty, under section 389, to have admitted the prisoner to bail at the time when the prisoner applied to be admitted to bail. When it is said that the jurisdiction which is given to the Sessions Court by section 390 in such a case as this to

admit the prisoner to bail, has the effect of excluding the power of the High Court, it seems to me that some misapprehension at any rate with regard to the two cases must exist. The case can only be brought before the Sessions Judge for bail upon the footing upon which it stood before the Magistrate; and although as it happened in this particular instance, the facts are such as rendered it the duty of the Magistrate to admit the prisoner to bail, and therefore such as would make it the duty also of the Sessions Judge on appeal to direct that he should be admitted to bail; yet, generally, the case before the Magistrate as regards the question of bail and the case in this Court may materially differ. When the case has been brought up to this Court under the powers given by section 297, and the day for further investigation and enquiry in the Court below has thereby necessarily been postponed for a considerable period, an additional element, a further ingredient has been added to the case, which would not have been in it had it been in the ordinary course in the Sessions Court; for it must be, as it seems to me, a most important matter for consideration in regard to the propriety of admitting the prisoner to bail, that this Court has found it necessary to postpone the day of further enquiry, and thereby considerably enlarged the period of the prisoner's intermediate imprisonment if he is to be detained in prison in the meanwhile. This, I repeat, is a most important element to be considered when the propriety of releasing upon bail is in question, and the addition of it may serve to turn the scale in the prisoner's favor when this Court is called upon to determine what order is fit and proper to be passed under section 297. On the whole, then, it seems to me that the objections which the learned Legal Remembrancer made to the rule of the 12th of May fail him. I think that the rule is good and valid, and that it was the duty of the Magistrate to comply with it. It is virtually admitted on the facts that he did not comply with it, for he certainly did not release Abdool Kadir. It seems to me impossible to say that the admitting him to bail upon recognizances conditioned in the way in which the recognizances in this case were conditioned is the same thing as releasing the prisoner. I understood the learned Legal Remembrancer in his argument of the day before yesterday



to appeal to section 391 as an excuse for the conduct of the Magistrate, and to urge that that section did afford a ground for a possible misapprehension on Mr. Kemble's part as to the intentions and orders of this Court involved in the direction to release on bail, and this, I take it, is pretty nearly as much as admitting that the Magistrate did not carry out the orders of the Court as they were intended to be carried out. I do not think I need dwell upon the terms of section 391, because it seems to me that if one reads that section with an intelligent attention, he will see that the meaning of it is, not that a man when enlarged should be given a qualified or abridged liberty, but that it should be competent to the Court to make the recognizances extend to ensuring his attendance at more than one stated time or contingency to meet the purposes for which it was necessary that he should be bound to attend the Court, as, for instance, from day to day during the investigation or trial. The learned Legal Remembrancer also very forcibly put before us that there could be no intention on the part of any subordinate officer to disregard the orders of this Court, because he has an overpowering incentive to do his duty in the certainty which he must perceive of the action which would be taken by the executive Government in the event of his not doing it. If such motives as those for right action are to be referred to, I would also say that this Court has the power of vindicating its own authority whenever that authority is intentionally disregarded; and if it sometimes becomes necessary or expedient so to do when private persons are the offenders, such a course would be still more necessary and expedient when judicial officers subordinate to it deliberately disobey its orders. If such a case should ever occur, as I trust and believe it would not, it seems to me that it would constitute such a public scandal upon our administration of justice here as would demand the immediate intervention of this Court of its own authority, and I doubt not that such intervention would be effected. But we entirely accept the learned Legal Remembrancer's assurances that Mr. Kemble in this case had no intention whatever of disobeying the orders of this Court, or of doing any act of disrespect towards this Court. It is, I think, unfortunate that he was, if I may use the expression, not so

entirely and thoroughly loyal towards superior authority in the first instance as he might have been, because it is clear that had the case to which the rule of the 12th of May was directed been sent up to this Court, and Abdool Kadir released on bail without delay, the further complication of the matter would have been avoided, and the subordinate Court would have been set right most easily without that inconvenience, even to Mr. Kemble himself, which the course adopted by him has certainly brought about.

The third rule in some sense disposes of itself, and we have now before us both the record of the first case and the record of the second case preferred by Mr. Kemble against Abdool Kadir Khan. The last question then for us to consider is what is to be done in the matter of these two cases. The petitioner has asked that we should transfer the further investigation of them to some other Court, and I feel myself most reluctantly forced to say that in view of the events which have occurred, I think both Mr. Kemble and Mr. Wyer, although, as I have already said, I acquit them altogether of any intention other than the intention to do their duty towards this Court, and as public officers have nevertheless come to be placed in a false position. As I remarked at the outset, the action which was taken by Mr. Kemble in the beginning, was the action of a prosecutor. Had he openly prosecuted the case which he set up against Abdool Kadir before an independent Magistrate, I doubt not that everything would have gone well. As it was he made some show of handing the matter over to another officer, but he did not do so in reality. I have already commented upon his letter of the 30th of December from himself to himself. On the 28th of April he directs the Joint-Magistrate to issue a warrant of arrest, and the Joint-Magistrate does so, not in the exercise on his own part of an independent judicial discretion, but because he is asked to do so by the Magistrate of the district upon the footing of a letter which that Magistrate wrote to him or brought to his notice. The prisoner upon being arrested is not even then brought up before the Magistrate who issued the warrant of arrest, as he ought to have been in due course of law. Nothing, I think, can be clearer now than that the purpose of a warrant of arrest has been fulfilled when the prisoner is brought



before the Magistrate who issued that warrant, or any other Magistrate qualified to act for him; and, further, that it is the duty of the person who receives the warrant, and is charged with its execution, to bring the prisoner before the Magistrate without any unnecessary delay. The warrant of arrest is issued, in the ordinary course, either upon information laid by a third person before a Magistrate, or by the Magistrate of his own authority under section 142 of the Code, but still, when the prisoner is once arrested under it, the remaining course of proceeding which is to be pursued is the same in both cases; the prisoner should be brought promptly before the Magistrate, and the Magistrate has then no authority to further detain him in custody, or to remove him to prison without some reason made manifest to him, either in the shape of sworn testimony given before him, or in some other form which can be put upon the record, and which is sufficient to justify him in sending the prisoner to prison, there to be detained for a limited period before further examination,—a period which is never in any case to exceed 15 days. Nothing of the kind occurred here, and it is most important, I think, to bear this in mind, because it goes to show that Mr. Wyer has not almost from the beginning to the end, or at any rate for the greater portion of the case, given himself ever an opportunity of exercising a judicial discretion upon matters of evidence before him. In making the first order of commitment to hajut, *i. e.*, the first remand order, he acted on the memorandum of the Court Inspector only, and in making the mere formal remand order which he issued on the 1st of May, he acted solely upon the request of Mr. Kemble without any other reason manifest to him in any form whatever, as I understand, why he should so exercise his judicial discretion. The consequence was that from the 28th of April until the 8th of May, *i. e.*, for ten days, Abdool Kadir was detained in custody without any legal cause, simply at the instance of Mr. Kemble, as it seems to my judgment. On the 8th of May the evidence of Sreenath Banerjee was taken. I will assume that that evidence was sufficient to furnish a ground for the further detention of the prisoner. In order that it should do so, it ought to have a tendency to show that the prisoner had committed some specified offence, and that further evidence

would be likely to be obtained by a remand. I am not sure that there is even now after Sreenath Banerjee has given his evidence any sufficient material in the record to indicate what offence has been committed by any one, or further to indicate that Abdool Kadir is the person who committed it. The warrant of arrest was issued clearly in ignorance of any evidence bearing on the point, for it did not in any degree specify the offence of which Abdool Kadir was accused, it merely stated generally that he was to be arrested for an offence under section 409,—a vague statement of this kind, I may remark, is by no means a compliance with the provisions of the Criminal Procedure Code, which for obvious reasons directs that the offence shall be specified in the warrant. What information could possibly be conveyed to an ignorant prisoner by such a statement. I will not pay Mr. Wyer the bad compliment of supposing that he ever thought it was sufficient. The fact was that he could not make it more specific, and this fact affords the key to the whole of the irregularities committed. After the 14th Abdool Kadir's imprisonment for seven days, which was effected by Mr. Kemble, was clearly without jurisdiction, and without legal cause. Mr. Kemble was still not in a position to make a definite accusation against Abdool Kadir, and nevertheless was still struggling by any means, regular or irregular, to keep him in his grasp. And, again, when we come to the second case preferred by Mr. Kemble upon alleged new grounds against Abdool Kadir, we find that although the original warrant of arrest was probably founded upon sufficient sworn information, yet the subsequent remand from the 22nd until the 30th was an order again made by Mr. Wyer without any reasonable ground, or indeed any cause whatever. Thus it appears to my view very plainly that Mr. Kemble has been acting in this matter from first to last, in the first case as well as the second (calling them two cases, though they really are one), as the prosecutor of Abdool Kadir Khan. It seems to me, further, that in neither the one case nor in the other is he yet in a position to specify in any degree the particular charge or charges upon which he is prepared to accuse Abdool Kadir, and in neither case is he yet prepared to offer evidence upon which he can ground a charge against him. It is pro-

bably pretty certain that there were very large defalcations in the Purneah Collectorate treasury in 1870 and 1871, and no doubt Mr. Kemble believes that Abdoel Kadir was the person who embezzled a good deal of the money; but he cannot yet make any particular accusation against him, and is uncertain what evidence of his guilt will ever be forthcoming. In this situation Mr. Kemble has, as it seems to me, most anxiously from the time when he came to know of the judgment of acquittal passed by this Court, endeavoured to hold Abdoel Kadir as it were under his hand, while he is making those enquiries and investigations which he believes will enable him some day to make a definite charge, and to support it with evidence against Abdoel Kadir. He has used the authority of Mr. Wyer as Joint-Magistrate in aid of his purpose to keep Abdoel Kadir within arm's reach in the manner I have described. It further seems to me that during all those proceedings Mr. Wyer has lent himself to Mr. Kemble's purposes, and has refrained from exercising a real judicial discretion of his own. He has arrested Abdoel Kadir at Mr. Kemble's dictation, and detained him in prison without legal cause at Mr. Kemble's request, and he did this last in the so-called second case when he must have had full notice of the high-handed character of Mr. Kemble's conduct in confining Abdoel Kadir for a week in the civil prison. It is with this view that I say it appears to me that both Mr. Kemble and Mr. Wyer have come to be in a false position in this matter, and that I think it will not be right or fair either to themselves or to the prisoner, that the further enquiry into and investigation of these two cases should be carried on judicially by either of these two gentlemen.

I believe I may say that we are agreed upon taking the course in this case which was taken in the precedent afforded by the *Bancoorah* case.\* There is no doubt, for the reasons which were put forward by the learned Legal Remembrancer the day before yesterday, that it would be exceedingly inconvenient, and probably would cause great expense and delay, if this case were sent to another district for enquiry and trial. We desire to avoid this consequence if possible, and accordingly we think that it will be best that our views with regard to the necessity of removing these cases from the

cognizance of Mr. Wyer and Mr. Kemble should be communicated to the Government of Bengal, in the hope that the Government may depute a qualified officer to Purneah to entertain these cases in the place of either of those gentlemen. And upon being certified that such deputation has been made we will make an order for the transfer of the cases to the officer so appointed, for due enquiry and investigation. We think further that any other case which Mr. Kemble may wish to institute against Abdoel Kadir in his capacity of Collector as prosecutor, arising out of these Collectorate defalcations, should be also preferred before this official, and be proceeded with of course as promptly as possible. Should the Government of Bengal not see good reason to make an appointment of this kind, we shall feel obliged to transfer the case to another district. We therefore make no order at present, but simply adjourn the case for one month. The accused will remain on the present bail until called upon to answer to the charges by the Local Court.

*Kemp, J.*—I entirely concur in the judgment which has just been delivered by Mr. Justice Phear. It has occurred to me to have to sit for a short time with that learned Judge during the illness of Mr. Justice Ainslie, and during that period two cases which had been tried by two Sessions Judges of Zillah Purneah came before us on appeal. In both those cases the accused Abdoel Kadir Khan was concerned. In one of those cases Mr. Justice Phear passed a somewhat severe censure upon the conduct of the Sessions Judge, Mr. Lockwood, and I entirely concurred in that censure, although I did so with great regret. I am of opinion, an opinion deliberately arrived at, that the whole of the proceedings in this case, so far as they have gone, are most discreditable to the judicial authorities of Zillah Purneah. It appears that in 1870-71 certain defalcations took place in the Collectorate of Zillah Purneah. I understand that the Government have recouped themselves by directing the then Collector, Mr. Worgan, to make good the sums embezzled by deductions from his salary. Subsequently it was necessary to cast about for a victim upon whom to saddle these defalcations, and various charges, the subjects of the former trials, and of the proceedings now before us, were laid against the accused Abdoel Kadir Khan. This person

\* IV. Bengal Law Reports, p. 1, appendix.

was at the time of the defalcations the Head Clerk of the Collectorate. Ordinarily speaking, and I speak from my own experience, which is not a limited one in Collectoriat matters, a person in such a capacity, namely, that of Head Clerk, would not be entrusted with any money belonging to Government, and therefore it must have been under very exceptional circumstances that Abdool Kadir Khan could ever have had anything to do with money matters in the Collectorate. We have been told that Abdool Kadir was a great favourite of the late Collector, Mr. Worgan, and although during that gentleman's presence at the Station of Purneah before he went to England on furlough, proceedings were taken against Abdool Kadir before Mr. Weeks, who was then the Joint-Magistrate of Purneah, proceedings taken sometime after the defalcations were discovered, and as already observed, at a time when Mr. Worgan was present at the station, who having himself been called upon to make good the amount of these defalcations had a personal interest in fixing the responsibility upon some body else, even then, and upon picked charges, the final result is that the accused has been acquitted. After the double acquittal by this Court in the trials above alluded to, the first being conducted by Mr. Lockwood, and the second by Mr. Ward, further proceedings have been taken which have led to the three rules which are now before the Court.

It is quite unnecessary for me to add anything but a few words of entire concurrence with what has fallen from Mr. Justice Phear with reference to the objections taken by the Legal Remembrancer as to the jurisdiction of this Court.

It appears to me clear that Mr. Kemble the Magistrate has disobeyed the orders of this Court, but I am happy to find that my learned colleague is of opinion that there has been no want of *bona fides* on the part of Mr. Kemble in this matter.

I must say, speaking for myself, that Mr. Kemble's conduct, more particularly with reference to the double capacity in which he has acted in this matter, endeavouring to evade compliance with the orders of this Court as Magistrate by turning himself for the notice into a Collector, and then acting under an old regulation which has been repealed, is not altogether consistent with an earnest intention to carry out our orders.

I do not wish, however, to press this matter further, nor in any way to dissent from the judgment which has just been delivered by my learned colleague. In the matter of the transfer of the case to another Court, I admit that this is a step which this Court ought not to take, except under extraordinary circumstances, and on very clear and satisfactory grounds. I think it is undoubtedly a slur upon an official of any grade when proceedings which have been instituted before him are removed from his Court to another Court; but if the interest of justice require that such a step should be taken, it is the duty of this Court to do so without any reference to what the feelings of an official may be on receiving the orders of this Court, directing him to transfer the case to another officer. Such proceedings of course carry with them an indication that this Court can have no longer any confidence in that officer in the matter of his further proceeding in the case under consideration, but as I have already said, the interests of justice must be first looked to.

In this case I do not think it right that Abdool Kadir, after what has passed, and looking to the former proceedings which have taken place in this case, and to the attitude of defiance in which the local authorities have placed themselves in carrying out the orders of this Court, or rather in not carrying out its orders, should be tried either by Mr. Kemble or by Mr. Wyer. I do not think, and I say so advisedly, that Abdool Kadir would obtain a trial entirely free from bias before either of those officers.

It is therefore with considerable reluctance and regret that I am obliged to concur in the transfer of this case, as also in the censure which has been passed upon the local officers by my learned brother Mr. Justice Phear.

## CRIMINAL APPELLATE SIDE.

APRIL 21, 1873.

(Before the Hon'ble Sir Richard Couch, Knight, Chief Justice, the Hon'ble Louis S. Jackson, the Hon'ble J. B. Phear, the Hon'ble W. Ainslie, and the Hon'ble C. Pontifex, Judges)

QUEEN vs. SAHID ALI AND OTHERS, Appellants.

Baboo Umbica Churn Bose and Rujoonee Nath Bose for Appellants.

Committed by the Magistrate, and tried by the Sessions Judge of Backergunge, on a charge of murder. Appeal No. 979.

Held by the majority of the Full Bench, Ainslie J. dissenting, that the two alternatives of Sec. 149 do not cover all possible cases of an offence being committed by one member of an unlawful assembly during the time when the common object of the assembly is being prosecuted, and that therefore in every trial of prisoners on a charge framed under the provisions of Sec. 149 of the Penal Code, even when it is proved that the specified offence was committed by one of the members during the pendency of that assembly, it yet remains an issue of fact to be determined on the evidence whether that offence was committed in prosecution of the common object, i. e. whether it was immediately connected with that common object by virtue of the nature of that object; and if not, whether it was an offence such as the members of the assembly knew to be likely committed in the prosecution of the object.

*Couch, C. J.*—The appellants in this case have been convicted under section 149 of the Penal Code. A comparison of this section with section 460 shows, as has been noticed by my brother Phear, that section 148 is not intended to subject a member of an unlawful assembly to punishment for every offence which is committed by one of its members during the time they are engaged in the prosecution of the common object. The difference of the language of the two sections seems to show that the legislative authority had in its mind the distinction between the two cases; and it is not sufficient, in order that a person may be convicted under section 149, that there should be an unlawful assembly, that the members of it should be prosecuting the common object of it, and that an offence should be committed by one of them.

I need not repeat the language of the section. It is divided, as it seems to me, into two parts, and, in my opinion, in order to bring a case within the first part, namely that which speaks of the offence being com-

mitted in the prosecution of the common object of the assembly, the act must be one which, upon the evidence, appears to have been done with a view to accomplish the common object. I think this is the meaning of that part of the section, and we must see whether the act was done with that view.

The Sessions Judge has found, and I think correctly, that the common object in this case was to drive Fukeer Buksh off the land, and he has stated, I also think in accordance with the evidence, what occurred: "I do not doubt," he says, "that the unexpected resistance offered by Samed Ali and Shuruf Ali, but more specially of the former, who was a young and powerful fellow, and who snatched a *latce* from the hands of one of his adversaries, and laid about vigorously with it, led to the sudden, and probably at first unintended use of the gun by Turee-boollah. Finding his party driven back by the two men, Samed Ali and Shuruf Ali, for the two old men, Fukeer Buksh and Indaz Ali, were not of much account, (though Fukeer Buksh's right hand shows that it was considerably knocked about) Tareeboola raised his gun, and fired, striking the advancing Samed Ali full in the chest." That does appear to me to be an act done by Tureeboollah, with a view to accomplish the object of driving the other party off the land; but in consequence of the unexpected counter-attack of that party, and with a view to prevent or repel it; I think that is the fair conclusion from the evidence; and certainly in a case of this description where, if the accused are found guilty, they are liable to a sentence of death, if there is a reasonable doubt as to the view with which the gun was fired, they ought to have the benefit of it; I am unable to say, upon the evidence in this case, that the firing the gun was done in the prosecution of the common object of the assembly.

Then I have to consider the second part of the section, that the offence is to be such as the members of the unlawful assembly knew to be likely to be committed in the prosecution of the common object. At first there does not seem to be much distinction between the two parts of the section, and I think the cases which would be within the first offences committed in prosecution of the common object, would lie generally, if not always, within the second, namely,

offences which the parties knew to be likely to be committed in the prosecution of the common object. But I think there may be cases which would come within the second part, and not within the first. Without laying down the law as to any other case than that before us, I think there might be a case of this kind; persons assemble with a view to attack and plunder the house of a particular person; that would be an unlawful assembly, and the common object of the assembly would be house-breaking, or the other offences which would be included in such acts as attacking and plundering a man's house; but from some cause, such as a show of resistance, they might not continue to prosecute that common object, and before they had dispersed, and whilst they continue to be an unlawful assembly, some of them might plunder another house, and thereby commit an offence. Such a case might come within the second part of the section, as an offence which the members of the unlawful assembly knew to be likely to be committed in prosecution of the common object, but which was not committed in the prosecution of it. But that is a case which we should have to determine when it arises. I only mention it as showing that there may be cases which would come within the second, but not within the first part of the section.

The question in this case is whether, upon the evidence, we can say that these persons, when they met together with the object of driving Fukeer Buksh and his party off the land, supposing they knew that Tareeboolla had a gun with him, knew also that he was likely to make use of it in such a manner as to be guilty of the offence of murder. Seeing what is necessary to constitute that offence, I am unable upon this evidence to come to the conclusion that these persons knew that this was likely. I think it is not only possible, but probable that they did not think that the gun would be used in that manner by Tareeboolla. And it seems to me, upon the finding of the Sessions Judge, that it was so, because he appears to have thought that the use of the gun was sudden, and probably unintended. He seems to have thought that if nothing more had occurred than the driving the party off the land, and what might naturally be expected to happen in doing that, the gun would not have been used in such a manner as to make

the person using it guilty of murder; and as I said in regard to the first part of the question, we are bound, where there is a reasonable doubt, to give the accused the benefit of it.

I concur with the other members of the Court in thinking that the accused ought not to have been convicted under section 149, but that they may properly be convicted under section 148. The conviction will be altered accordingly, and the sentence will be one of three years' rigorous imprisonment.

There was a similar case to this which was heard by myself and Mr. Justice Phear and Mr. Justice Ainslie, the persons accused in that case being armed with *latees*, and there being no gun, Mr. Justice Phear and myself are of opinion that the conviction should be under section 148 for the same reasons as have been given by us in this case, and Mr. Justice Ainslie is of the contrary opinion; he takes the same view as he did in the judgment which I have read for him. Consequently, in that case, also the accused persons will be convicted under section 149, and the sentence will be three years' rigorous imprisonment.

*Jackson, J.*—It appears to me that the construction of this section (149), that is, a construction which shall be at once reasonable and grammatical, involves two difficulties, or at least two points which call for attentive consideration:—

1st. The common object;

2nd, or such as the members, &c.

It has been proposed to interpret the "common object" in a precise sense, so as to indicate the exact extent of violence to which the rioters intended to go, *viz.*, to take possession of the land by force, extending, if need be, to wounding and the like.

This, I think, is not the sense in which the words were intended to be understood.

They are not, it seems to me, used in the same sense as "the common intention" in section 34, which means the intention of all, whatever it may have been.

The words here seem to have manifest reference to the defining section 141, and to point to one of the five objects which, being common to five or more persons assembled together, make their assembly unlawful.

For this reason I think that any attempt to mitigate the rigour of the section by limiting the construction of the words "common object," must fail, and that any offence

done by a member of an unlawful assembly in prosecution of the particular one or more of the five objects mentioned in section 141, which is or are brought home to the unlawful assembly, to which the prisoner belonged, is an offence within the meaning of the first part of the section.

We then come to the second point, *i. e.*, the meaning to be given to the words "or such as the members," &c.

If the word "or" has been used in an alternative sense, the sentence would, if fully expressed, run thus: if an offence is committed, which is committed in prosecution, or which, if not so committed, is yet such as the members knew to be likely, which seems absurd.

Nor can it be believed that the Legislature intended to attach the consequences of (say) murder committed by a member of an unlawful assembly in prosecution, &c., to all members of that assembly, unless those members had a knowledge that the commission of murder was likely as an incident of their endeavours to carry out the "common object."

For this would be the consequence, if the word "or" be a simple alternative, and if the first condition being fulfilled, *viz.*, that the act was committed in prosecution of the common object, it was unnecessary to resort to the second, in which case the finding would simply be that an offence, namely, murder, had been committed by a member of the unlawful assembly in prosecution of the common object thereof, although the person who actually committed the murder had used means not within the contemplation of the others, such as the firing of a concealed pistol, or the like, and all the other members of that assembly would thereupon be liable to be hanged or transported for life at the discretion of the Judge,—a thing which seems impossible to have been within the intention of the Legislature.

But if the word "or" be treated with some violence, I admit as illustrative or instead of and, and the knowledge of likelihood be thus a further condition imposed, the law becomes at once reasonable and intelligible.

In view of the difficulties caused by the section, I was at first strongly inclined to believe that the word "or" had crept in by a misprint, or clerical error, either instead of "and," or simply as an addition to the

text, and I applied for information to the Legislative Department. My learned friend, Mr. Whitley Stokes, however, assures me that the word appears in all the copies of the Code as successively considered and amended as far back as 1856, when the section, as it now stands, took the place of the original section, numbered 183, which may be seen at page 32 of the edition printed in England in 1851, and which was of a different character.

In the difficulty which besets us, the construction which I have suggested is the only one which seems to me possible, and I could not consent upon section 149 to subject any person to the consequences of an offence which, though committed in prosecution of the common object of the unlawful assembly, he himself had not directly contemplated unless it was proved that he knew it to be likely that such offence would be so committed.

In the particular case before us, I concur in the view of the facts taken, and in the order to be made by the majority of the Court.

*Phear, J.*—The four prisoners, whose petition of appeal is now before us, are named Sahid Ali, Dini Ali, *alias* Ari Ali, Kaloo Sikdar, and Gundhurbo Khan. They have been convicted by the Sessions Court, constituted of a Judge and two assessors, of the offence of murder, under the provisions of section 149 of the Indian Penal Code, and have been sentenced each to the punishment of transportation for life.

The Judge states the material facts of the case thus:

"I agree with the assessors that it is clearly proved that the prisoners and others attacked Fakir Buksh whilst he was ploughing his own land in company with his three kinsmen and co-sharers, Samed Ali Sharaf Ali, and Kadez Ali, and that in the struggle Tareebocoula, one of the attacking party, (but not, it may be observed, one of the prisoners, fired a gun loaded with small shot), killing Samed Ali on the spot, and wounding Sharaf Ali in the back."

The Judge then says: "All the prisoners, therefore, as taking part in the riot, and having the same object in view, namely, to drive Fakir Buksh off the land, are in the eye of the law, guilty of murder." And, again, after discussing the previous relations between the parties, the Judge gives the

facts of the occurrence in little more detail as follows :—

"It seems to me, therefore, quite clear, 1st, that the land was in the possession of Fakir Buksh, and that he and his companions were ploughing it when they were attacked; and, 2nd, that the reason assigned by Fakir Buksh for the attack is the natural and probable one, *viz.*, that Sahid Ali having paid up the full rent, was determined not to allow Fakir Buksh to hold and cultivate his land until he made good his quota.

"I cannot doubt that the unexpected resistance offered by Samed Ali and Sharef Ali, but more especially by the former, who was a young and powerful fellow, and who snatched a *latee* from the hands of one of his adversaries, and laid about vigorously with it, led to the sudden, and probably at first unintended use of the gun by Tareeboolla. Finding his party driven back by the two men, Samed Ali and Sharef Ali, for the two old men Fakir Buksh and Kodaz Ali were not of much account (though Fakir Buksh's right hand shows that he was considerably knocked about), Tareeboolla raised his gun, and fired, striking the advancing Samed Ali full in the chest. Ashruff Ali saw the impending blow, and just had time to turn and fly, and so received a considerable portion of the charge in his back.

"I hold it, therefore, proved in the evidence that all the prisoners are guilty of the offence laid to their charge.

"The Court concurring with the assessors, finds that Sahid Ali, Ain Ali *alias* Anoo Alia, Kaloo Sikdar, and Gundhurbo Khan are guilty of the offence specified in the charge, namely, that they being members of an unlawful assembly, in the prosecution of the common object, in which, namely, to enforce a supposed right to a certain piece of land, one Tureeboolla, a member of the said unlawful assembly, committed murder by causing the death of one Samed Ali, have committed the offence of murder, and have thereby committed an offence under section 149 of the Indian Penal Code, punishable under section 302 of the said Code, and the Court directs that the said Sahid Ali, Ain Ali, *alias* Anoo Alia, Kaloo Sikdar, and Gundhurbo Khan, be each punished with transportation for life from this date."

It appears to me that the reasoning by which the Judge, on the facts thus stated by him, brings the charge home to the prisoners, is somewhat incomplete. The

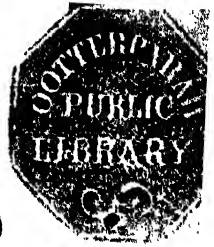
words of section 149, Indian Penal Code, are as follows :—

"149. If an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly, or such as the members of that assembly knew to be likely to be committed in prosecution of that object, every person who, at the time of the committing of that offence, is member of the same assembly, is guilty of that offence."

These words do not, in my opinion, support the view which the Judge expressed at the outset of his judgment, and by which he appears to have been guided to his final decision, to the effect that, because murder was committed by one member of the assembly, therefore all the prisoners, as taking part in the riot, and having the same object in view, namely, to drive Fakir Buksh off the land, were, in the eye of the law, guilty of murder. It seems to me clearly not the case that every offence which may be committed by one member of an unlawful assembly, while the assembly is existing, *i. e.* while the members are engaged in the prosecution of a common object, is attributed by section 149 to every other member. The section describes the offence which is to be so attributed, under two alternative forms, *viz.*, it must be either, 1st.—An offence committed by a member of the unlawful assembly, in prosecution of the common object of that assembly; 2nd.—An offence such as the members of that assembly knew to be likely to be committed in prosecution of that object.

Now, inasmuch as the continuance of the unlawful assembly is, by the definition of section 141, made contemporaneous with the prosecution of the common object, it seems tolerably clear that the Legislature must have employed the words "prosecution of the common object" with some difference of meaning in these two passages respectively. Also the mere fact that the Legislature thought fit to express the *second* alternative, appears to show very distinctly that it did not intend the words "in prosecution," which are found in the first to be equivalent to "during the prosecution," for if they were, then the second alternative would have clearly been unnecessary, and a comparison with this passage of the language which is used in section 460, where the Legislature makes all the persons concerned in committing a burglary punishable with transportation





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*Minute by the Hon'ble Arthur Hobhouse, Q. C., Legislative Member, Governor General's Council.*

THE *Pioneer* gives the following summary of the alterations in the Code of Civil Procedure, said to have been proposed in a minute by Mr. Arthur Hobhouse, Legal Member of the Governor General's Council:

- (a.) "That no second appeal should be allowed as of right when the value of the suit is under Rs. 200."
  - (b.) "That no second appeal should be allowed as of right when the Appellate Court agrees with the Court of first instance."
  - (c.) "That in other cases a right of general appeal should lie to the High Court from appellate decrees of Subordinate Courts except the cases falling under Section 27, Act XXIII of 1861."
  - (d.) "That the Court pronouncing the appellate decree should have the power of allowing appeals from its own decrees."
  - (e.) "That, notwithstanding prohibition (a) the High Court shall have the power of allowing an appeal, if the nature of the suit is such that its value is not measurable in money."
  - (f.) "That, notwithstanding either prohibition, the High Court shall have the power of allowing an appeal, when the importance to the public in general of the question raised in the suit is so great as in the judgment of the Court to call for an appeal."
- "It might also be well to give to the Court pronouncing the appellate decree

full powers to reserve a point of law or an inference of fact, or to state a case for the opinion of the High Court instead of allowing an appeal."

Proposition (a) involves, we fear, a fallacy. It presupposes the infallibility of the Lower Courts in suits below Rs. 200. In the majority of special appeals, however, the pecuniary value does not exceed that amount, and yet we find that in at least one out of three, the decrees of the Lower Appellate Courts are reversed by the High Court in special appeal. Such being the case, there seems to be neither reason nor rhyme for shutting out special appeals in cases of the description referred to. Intricate questions of law may certainly arise without any reference to the pecuniary value of the suits, and although the Courts pronouncing the appellate decree, may have power to allow an appeal or to reserve a point of law, or an inference of fact or to state a case for the opinion of the High Court instead of allowing an appeal, yet, in practice, we are afraid, that in by far the largest number of cases no such appeal will be allowed, or reference made to the High Court, notwithstanding the incompetency of the Lower Courts to grapple with such questions, and even if such reference be occasionally made, we do not understand how with the present judicial staff, that circumstance alone can obviate the necessity of an appeal to the High Court on points of law in all other cases. We see daily how errors are committed by the Lower Courts in the decision of cases involving only simple and ordinary questions of law, and with this fact



staring us in the face, we hardly know how to reconcile ourselves to the state of things proposed by Mr. Hobhouse. If the percentage of reversals of the decrees of the Lower Courts in special appeal were much less than it is at present, that circumstance alone would not justify the Legislature in defining the minimum pecuniary limit in appeals to the High Court at Rs. 200. That one decree at least out of three decrees of the Lower Appellate Courts is found to be erroneous in law is proved by the statistics of special appeals for the last few years. How could the Legislature then shut out special appeals involving a pecuniary value of less than Rs. 200, and suffer such illegal decrees to stand to the prejudice of the parties cast?

If appeals are allowed from the decrees of the Lower Appellate Courts in suits involving larger amounts, it is only on the ground of the liability of those Courts to commit blunders in law. We fail to understand how this liability to commit errors in law ceases to exist when the value of a suit does not exceed a certain amount.

It is the fashion now-a-days to consider the time of the Judges of the High Court wasted if it is employed in sifting and deciding questions of law arising out of special appeals of small pecuniary value. But it must be remembered that in the result of the decisions of these appeals depend the fortunes, "the little all" of many a poor family, and consequently their interest in these cases is just equal to, if not greater than, what is felt by their more fortunate countrymen and others in suits involving larger amounts. A wrong decision for example in a suit for enhancement of rent under Rs. 200 may and does often render many a heretofore well-to-do ryot literally homeless, and reduce him, with perhaps with a large family, to the very brink of starvation. That such decisions by the Lower Courts are not such rare things as they are believed to be must be patent to all who are in the least familiar with the proceedings of our Courts. We do not pretend that the Judges of the High Court are in-

fallible or have the power, under the present state of the law of procedure, to set aright all erroneous decrees of the Lower Courts. What we mean to say is, that the presumption is always in favor of the Judges of the highest Court of appeal in the country, and that where their hands are not tied down by the law, they are presumed to do generally that substantial justice between man and man which we in vain look for in the majority of the decisions of the Lower Courts.

Besides, the valuation that is made of suits for real property does not always represent the real value of the property in dispute. This test therefore is any thing but safe or certain.

Proposition (b) would seem to imply that the Judges of the Lower Appellate Courts are as a rule superior in legal attainments to the Judges of the inferior Courts. The reverse however is the real state of things. What guarantee then have we of the soundness of the decisions arrived at by the Lower Appellate Courts? Whatever may be the value of the concurrent findings of fact come to by the Lower Courts, we are not quite sure whether any particular presumption arises from the fact of their taking the same view of the law in any particular case. We have been accustomed to see the concurrent decrees of two Lower Courts reversed in special appeal on pure points of law, and therefore we do not think that any particular presumption arises in favor of the correctness of a decision when the Lower Appellate Court concurs in the opinion of the Court of first instance:

It would appear that Mr. Hobhouse would fain do away altogether with what are now called second or special appeals, but considering the peculiar constitution of the Courts of this country, we think, as we have already said, that the law of special appeal, as it obtains at present, may be modified to a certain extent, but not wholly dispensed with.

We are fully alive to the fact that in special or partial appeals, Courts cannot be expected to do justice in the

widest sense of the term. But where the Lower Courts are presided over as in this country by gentlemen who have not had the benefit of what is called a proper legal training, such appeals purely on points of law are not wholly without some advantage.

With reference to this proposition, we would suggest the following amendment, to wit, that when the Lower Appellate Court concurs in the judgment of the Court of first instance, a special appeal to lie to the High Court only on points of law, and that where the Lower Appellate Court reverses a decree of the first Court, a general or regular appeal to lie to the High Court on law as well as facts.

Proposition (c) which follows propositions (a) and (b) by way of a corollary does not require any particular comments. We would modify it thus:—

That in all cases under Rs. 5,000 where the Lower Appellate Court reverses the decrees of the Courts of first instance, a general appeal should lie to the High Court from the appellate decrees of the Subordinate Courts except in cases falling under Section 27, Act XXIII of 1861.

The power which Mr. Hobhouse would give the Courts pronouncing the appellate decrees, under proposition (d) of allowing appeals from their own decrees, would, we are afraid, be very sparingly exercised. We all know how anxious the Judges of the Lower Appellate Courts are to shut out special appeals. They generally make it a point to find facts on the evidence, throwing points of law, if any arise in the case, on the back ground, and subordinating them to the findings of fact, and all this with a view, as one would fancy, to leave no ground for special appeals. Indeed, who would run the risk of having his decision upset in appeal if one could help it?

With regard to propositions (e) and (f) we have not much to say. If the amendment we have proposed were adopted, there would be no necessity for the provisions embodied in these propositions.

It appears that it is the fashion now-

ous to the backbone. We are not exactly aware what foundation there is for the charge, but the fact is certain that it is echoed from mouth to mouth, and no body stops to enquire whether there is any truth in it. For ourselves, we are free to admit, that we have not yet been able to discover that they are more or less litigious than any other people. The fact is, that in consequence of the particular social and physical aspects of the country, certain classes of law-suits are peculiar here. Hence suits relating to adoption, alluvion and diluvion and boundary disputes including all manner of questions in respect of a variety of land tenures are nowhere else to be met with. But we fail to perceive how this circumstance alone can lead to the conclusion that fondness for getting up law-suits is inherent in the native character. Whether this conclusion is right or wrong, we need not pause to enquire, but the fact is certain that the natives have acquired an unenviable notoriety for litigiousness, and the result is that the Legislature as well as the local Judges of all grades and denominations are alike on the *qui vive* to catch an opportunity for restraining this propensity. To shut litigation out is accordingly an object of no ordinary importance with these gentlemen. They put their ingenuity on the rack, not with a view to find out the best means of improving the administration of justice, but only with a view to diminish the number of lawsuits, and thereby lessen the amount of judicial work. All eyes are accordingly directed towards special appeals, which do not appear to be in good odour with the authorities. Indeed, these constitute the bulk of the business of the High Court, and if these are wholly done away with, where is the use of retaining so many Judges for that Court?

We are free to admit that under the present state of the law, full justice cannot be done in Special Appeal. Being partial in their nature, they are restricted only to points of law. If there appear to be any errors in that respect in the decision of the Lower Appellate Courts, the High Court can set them right,

but can, on no account, interfere with the findings of fact arrived at by the Courts below, and it is ten to one that these findings, if properly scrutinized, are seen to ill accord with the real state of facts as disclosed in the Records. Viewed in this light, special appeals must be held to be ill adapted to secure the ends of justice. But it must at the same time be admitted, that if they do not afford full remedy against erroneous decisions, they certainly enable the Judges of the High Court to rectify the errors of law which appear in them. The remedy to be sure is only partial, but that even is better than no remedy at all.

Litigation, we think, is a game of chance in this country, as it must be, where the Judges are not properly trained to the profession of the law. It often happens that the party who has no case often gets a decree and the *vice versa*. In this state of uncertainty, nobody can make himself sure of the result of his case. Accordingly the party cast in one Court, thinks it proper, even if he has no case, to try his chance in the Appellate Court, and in this opinion he is not a little strengthened by the knowledge which he personally has of the result in many other cases similar to his own. Even in the High Court the state of affairs is not in a better position. Papers connected with an appeal to be filed, are shewn to a vakeel with reference to the probable result of the appeal if filed. He goes through the papers and ominously shakes his head, as much as to say that there is no hope. The papers are then shewn to another vakeel, and he is of the same opinion. The process is repeated and perhaps a dozen vakeels or more are of opinion there is no hope of winning the case in appeal. The appeal is notwithstanding filed and perhaps in due course is decreed. Such instances are not few and far between. The result then is that every body that is cast in the Lower Courts takes his chance and files an appeal, and this holds good of regular as well as of special appeals. Besides, the vakeels know for certain

what particular grounds of appeal take in with what Judges, and if the district from which the appeal comes, happens to be in the group as it is called of particular Judges, the appeal is not only filed but finally decreed if the hearing comes on before those Judges. But the reverse is the case, if other judges take up the appeal and decide it. Perhaps even now in the High Court there are Judges who, in special appeal, think that if every bit of documentary evidence has not been specifically mentioned in the judgment of the Lower Appellate Court as duly weighed and considered, notwithstanding there is a finding on the whole evidence in general terms, the case ought to go back for a finding on that piece of evidence which has not been so mentioned. Thus it is evident that it is this uncertainty of the law that contributes in a great measure to swell the number of appeals to the High Court, and not any particular innate propensity in the native character.

Mr. Hobhouse would seem to be fully aware of the fact, that special appeals do not afford proper remedy against bad decisions. Hence he is anxious to provide for a regular or general appeal to the High Court in all cases, as we fancy, between Rs. 200 and 5000, where the Appellate Court reverses the decree of the Court of first instance. To do this the more effectually he would shut out special appeals in cases below Rs. 200 and also up to Rs. 5,000 where the appellate Court agrees with the Original Court. Evidently he seems to think that unless he shut out these appeals, the staff of the High Court would not be equal to the business which must necessarily flow into it under the altered state of the law. We think his apprehensions to be ill founded for we have not the slightest doubt, but that if a regular appeal were allowed in all cases up to Rs. 5,000 where the Appellate Court reversed the decrees of the Original Courts, and a special appeal in all other cases as at present, to the High Court, the present number of Judges if they worked properly, would be quite equal to the increased work.

"By violating their obligation of fidelity to one only husband (says Harita), and by receiving the embraces of a stranger, vicious women confound families, for a son begotten by an adulterer while the husband is alive, is a *cunda*, or after his death a *golaca*; therefore let the husband guard his wife from the assaults of lust. If she be lost through vice, the honor of the family is forfeited; if that be lost, the pure succession of progeny is lost; through that loss the sacraments of duties and of manes are destroyed; those sacraments being destroyed, duty fails; duty failing, the husband's soul is lost; and his soul being lost, everything is lost."—(Colebrooke's Digest, vol. 2, p. 381.)

"Whether the texts above referred to, so far as they relate to the dependence of women, are as liberal as they ought to have been; and whether the Courts of Justice in the country constituted as they are at present, are bound to carry them out in their integrity are questions which we need not pause to discuss. It is sufficient for the purposes of our decision to say that they are in full unison with the feelings of the Hindoo community in general, and that the social status and privileges of Hindu women are still ordinarily determined and regulated by them.

"But, be this as it may, there can be no doubt whatever that those texts are eminently fitted to give us a clear idea of the general spirit of the Hindoo law so far as it relates to the question of chastity in Hindu women; and we are therefore justified in referring to them as a valuable guide in the present discussion which is intimately connected with that question. Such a course of procedure is fully warranted by the decision of the Privy Council, reported in p. 173 of the 11th vol. of Moore's Rep.\* One of the questions raised in that case was whether, under the Hindoo law as administered in the Benares school, property inherited by a woman becomes her *streedhan*, and a passage of the Mitakshara, the highest authority recognized in that school, directly supporting the affirmative of this proposition was strongly relied upon in the course of the argument. But their Lordships declined to act upon that passage; and one of the reasons assigned by them was that it was inconsistent with the general spirit of the Hindoo law as

shown by the numerous texts declaring the perpetual dependence of women.

"With these preliminary observations, let us proceed now to the direct examination of the question we have to deal with in the present case.

"We think it scarcely necessary to remark that the estate of a widow under the Hindoo law is one of a very peculiar character. To compare it with a life-estate, or with any other estate known to the English law, would be to misunderstand its nature completely; and if authority is needed to support this proposition, we have only to refer to the remarks made by the Privy Council in the case reported in p. 550, Moore, vol. 8.† It is true that the widow is allowed to succeed to the estate of her deceased husband as his heiress-at-law; and it is also true that she is allowed to represent that estate fully, so long as her right to hold it continues to exist. But her dominion over it is rigorously confined within certain defined limits beyond which she has no power to go; nor is it allowed to descend to her heirs after her death. As 'half the body' of her deceased husband she takes his property in default of male issue, but being not more than half, her power to deal with it is anything but that of an owner in the true sense of the term.

"Indeed, according to the true theory of the Hindoo law, she is nothing more than a trustee for her life for the soul of her deceased husband, if we may use the expression.

"For women the property of their husband (says Vyasa,) is intended only for use; let them not make waste of it on any account.'

"In commenting upon this passage the author of the Dayabhaga says:—(Colebrooke's Dayabhaga, p. 182, c. XI, s. 1, v. 61.) 'Even use should not be by wearing delicate apparel and similar luxuries. But since a widow benefits her husband by the preservation of her person, the use of property sufficient for that purpose is authorized. In like manner since the benefit of her husband is to be consulted, even a gift or other alienation is permitted for the completion of his funeral rites.' Accordingly the author says, 'Let not women make waste. Here 'waste' intends expenditure not useful to the owner of the property.

\* *Mussumat Thakoor Deyhee v. Rai Baluk Ram*, 10 W. R. P. C., 3.

† *The Collector of Masulipatam v. Cavalry Venkata Narraiah*, 2 W. R., P. C., 61.

"It is clear from this passage that every use made by a Hindoo widow of the estate inherited by her from her deceased husband, which is not conducive to his spiritual welfare, is, under the Hindoo law current in the Bengal school, an unauthorized act of waste; and the acknowledged founder of that school goes to the length of declaring that she is allowed to use that estate for the purposes of her maintenance, not because she has any independent right to do so, but because by preserving her person she confers a benefit upon his departed spirit. If this is not the true picture of the trustee character of the widow, it is difficult to make out what trusteeship means.

"It should not be supposed that the above provisions were intended by their framers to serve as mere moral precepts which the widow is at liberty to obey, or to disobey at her pleasure. On the contrary, the utmost precaution appears to have been taken by them to secure their strict enforcement. We have already shown that, according to the Hindoo law, women are deemed to be never fit for independence, and the widow in possession of her husband's estate is no exception to the general rule.

"When the husband is dead (says Nareda), his kin are the guardians of his childless widow. In the disposal of the property and care of her person, as well as in her maintenance, they have full power.

"The authority of this text is distinctly recognised in the Dayabhaga, which says:—

'In the disposal of property by gift or otherwise, she is subject to the control of her husband's family after his decease and in default of sons.'—(Dayabhaga, v. 64, s. 1, c. XI).

"In order to complete this part of the argument, let us pause for a moment to compare the widow's estate with that of a male heir under the Hindoo law. It is true that in the latter case also, the spiritual welfare of the deceased proprietor is the only test resorted to for determining the right of succession, but after the claimant is once found competent to satisfy the requirements of that test, the property is absolutely made over to him as his own in the fullest sense of the term. No effective restriction whatever is put upon his right of enjoyment, and the estate is allowed after his death to descend to his heirs, and not to those of the original owner. The only exception to this rule is to be found in the case of ancestral property under

the law current in the Benares school, but the principle upon which that exception is based, has nothing whatever to do with the present discussion.

"Nor is it necessary to go very far, in order to find out the reason of this distinction between male and female heirs. Women are incapacitated by their sex from performing the ceremony of *purvana shradh*, which constitutes, as it were, the very corner-stone of the Hindoo law of inheritance; and hence it is that we meet with a general tendency in that law to exclude them from the category of heirs. In the few cases in which women are allowed to succeed, they are allowed to do so upon the authority of special texts, and not upon the general principle by which the law of inheritance is regulated. 'Accordingly,' says the author of the Dayabhaga (s. 6, c. XI, v. 11), 'Boudhayana, after premising, 'A woman is entitled not to the heritage, for females, and persons deficient in an organ of sense or members, are deemed incapable to inherit.' The construction of this passage is, 'a woman is not entitled to the heritage,' but the succession of the widow and of certain others (mother, daughter, &c.) takes effect under express passages without contradiction to the maxim.

"The case of the widow affords a curious illustration of the tendency above referred to. So far as the original writers on Hindoo law are concerned, it appears that they were by no means unanimous in recognizing her right of succession, as may be seen from the numerous contradictory texts quoted on the subject both in the Mitakshara and in the Dayabhaga; and, indeed, if we were to guide ourselves solely and exclusively by those texts, it would have been extremely difficult for us to come to any satisfactory solution of the question one way or the other. Among the commentators the author of the Mitakshara is of opinion that the widow is entitled to inherit only when the family is separate. The author of the Dayabhaga repudiates the distinction between joint and separate family, but he also is obliged to admit that she takes under the authority of special texts, and that it is by those texts that the nature and extent of her right are to be determined and regulated.

"It should not be supposed that the above view of a Hindoo widow's estate is opposed to the Full Bench decision reported in p. 165 of the Special No. of the Weekly Reporter,

in which it was held that a widow is competent to sell her so-called life-interest in the property left by her husband. We do not wish to express any opinion as to the correctness or otherwise of this decision. It might possibly be supported upon the ground that such a sale is nothing more than mere anticipation of the proceeds which the widow could have realized from the estate if she had kept it in her own possession. But there is nothing in that decision to support the contention that the proceeds thus anticipated can be used by her for any purpose not authorised by the Hindoo law, that is to say, for any purpose not conducive to the spiritual welfare of her deceased husband. The Hindoo law, it should be observed, does not, at least in Bengal, recognize any distinction between the moveable and the immoveable portions of the estate, nor does it recognize any distinction between the *corpus* of that estate and its profits. That these profits do not become her *streedhan*, or peculiar property, in any sense of the term, is manifest from the fact that their residue, which remains after her enjoyment of the estate, is allowed to go to the heirs of her husband, and not to those of her *streedhan*. 'Therefore,' says the author of the *Dayabhaga* (s. 1, c. XI, v. 59), 'those persons who are exhibited in a passage above cited as the next heirs on the failure of prior claimants, shall, in like manner as they would have succeeded if the widow's right had never taken effect, equally succeed to the residue of the estate remaining after her use of it, upon the demise of the widow in whom the succession had vested. At such time when the widow dies, or her right ceases, the succession of daughter, and the rest, is proper.' Every expenditure incurred by a Hindoo widow which is not beneficial to the deceased owner is, as we have already shown, an unauthorized act of waste within the definition of that term as given in the *Dayabhaga*; and the word "use" in the above passage puts it beyond all doubt that the rule is just as much applicable to the increment of the estate as it is to the *corpus* of it. As for the absence of any distinction between the moveable and the immoveable portions of the estate, we have only to refer to the decision of the Privy Council reported in p. 487, Moore, XI.\* That decision was passed, it is true, with special reference to

the Hindoo law administered in the Benares school, but it may easily be shown upon precisely similar grounds that the same rule holds good in Bengal also. See also the case of *Kasheenath Bysack v. Horosoudere Dossee*,† which was a Bengal case.

"Suppose, for instance, that a widow sells her so-called life-interest in her husband's property for a lac of rupees, the sale may be allowed to stand on the authority of the Full Bench Ruling in question. But can it be contended that she would be entitled to use this lac of rupees in any manner she thinks proper, or that the male heirs of her husband, who have 'full power over her in the disposal of her property, in the case of her person and in her maintenance,' under the express provisions of the Hindoo law, would not be competent to take any legal steps to restrain her from 'wasting' the amount? It may well be that the Courts of Justice in this country, constituted as they are at present, are not in a position to compel a Hindoo widow to use her husband's property for the benefit of his soul, although we are far from saying that a Hindoo king would not have been found to do so to the fullest extent—he being expressly required by the Hindoo shasters to act as her guardian, and to chastise her, if led away from the path of virtue, as may be seen from one of the texts already quoted by us. But those Courts are bound to interfere in cases of waste, and it is in obedience to this general obligation that so many suits, instituted by reversioners to set aside acts of waste committed by widows, have been and are still being entertained by them. Suppose then, that a reversioner brings an action upon the ground that the widow is about to spend a large sum of money derived by her from the profits of the estate for a purpose not authorized by law, and suppose that his prayer is that an injunction should be issued commanding her not to spend it for that purpose, can the Court refuse to grant the injunction, if the ground upon which it is asked for is made out? This question, we apprehend, must be answered in the same way as if the threatened waste had related to a portion of the *corpus* of the estate, unless we are prepared to hold that, although we are bound to administer the Hindoo law when the widow claims to succeed to the pro-

\* *Bhugwan Deen Dobey v. Myna Bibee*, 11 W. R., P. C., 23.

† *Clarke's Rep.*, 91; *Shama Churn Sircar's Vyavasta Durpan*.



erty of her deceased husband, we are not bound to administer that law when the dispute is as to the nature of her right and the use she is entitled to make of it. We are aware that it has been held in some cases that the widow is not under any legal obligation to render accounts to the reversioner. We do not wish to express any opinion about the correctness of these decisions one way or the other. It may even be granted for the sake of argument that the widow is not bound to make good to the estate any sums already misspent by her. But there is no authority of any kind on the strength of which it can be held that she is the absolute mistress of the proceeds of that estate, or that the reversioner is not entitled to take any legal steps in order to prevent her from using those proceeds for a purpose other than that sanctioned by the Hindoo law.

"Such then being the nature of the estate inherited by a Hindoo widow every act done by her, the effect of which is to incapacitate her from using that estate for the only purpose for which she is entitled to use it, operates as a cause of forfeiture. The question is, therefore, reduced to this, is unchastity an act of this description? Looking at this question from a purely Hindoo point of view, we feel no hesitation in saying that the answer to it ought to be in the affirmative.

"Women," says Menu, the highest and most respected of all the Hindoo legislators, 'have no business with the text of the Veda; thus is the law fully settled.' Having, therefore, no evidence of law, and no knowledge of expiatory texts, sinful women are as foul as falsehood itself. This is a fixed rule.'—(Colebrooke's Digest, vol. 2, p. 390.)

"The following passage of Vyasa, however, which is cited by Rughoo Nunduna (one of the acknowledged authorities in the Bengal school), in connection with this very subject, and which will be more specifically referred to in a subsequent part of our judgment, is still more explicit on the point:—

"Oh Asundhanti! gifts, fastings, religious and other good acts of an unchaste woman are vain; their religious merits, also spotless beauty, are fruitless. Those wicked women, who by the commission of adultery, deceive their husbands, lose from that time the fruits of religious acts, and are doomed to hell."

"It is clear, therefore, that an unchaste woman, not only causes 'the loss of her husband's soul,' but she is totally incompetent to redeem it afterwards, inasmuch as every act done by her subsequent to the loss of her chastity must be necessarily destitute of all religious efficacy whatever. How then can it be contended that such a person is entitled to retain possession of her husband's estate, when she has by her own act reduced herself to a condition which renders her absolutely unfit to use that estate for the only purpose for which it was made over to her. As half the body of her deceased husband, she took it as a trustee for the benefit of his soul; but if she is no longer in a position to fulfil her duties as such trustee, the trust property must be taken away from her as a matter of course.

Nor is the above conclusion wanting an express authority to support it.

"That an unchaste widow has no right to succeed to the estate of her deceased husband is, we believe, a proposition of Hindoo law beyond all dispute. The Mitakshara, which is respected as a very high authority more or less in every part of Hindoostan, expressly lays down:—

'Therefore, it is a settled rule that a wedded wife being chaste takes the whole estate of a man, who being separated from his co-heirs, and not subsequently reunited with them, dies, leaving no male issue.'—(Colebrooke's Mitakshara, c. II, s. 1, vol. 39). The discussion in v. 18 is significant. In that verse the author repudiates the claim of a widow who is appointed to raise up issue for her husband, and he bases his opinion on a text of Bridha Menu, which expressly declares that a chaste widow alone is entitled to succeed. It is worthy of remark, that a mere appointment to raise up issue cannot, in the absence of anything done by the widow in pursuance of that appointment, affect her chastity in any manner whatever, and yet the bare likelihood of her keeping such an appointment, and thereby losing her chastity, is considered as a sufficient ground for her disinherison. It is clear, therefore, that, in the opinion of the author of the Mitakshara, the widow, who is to succeed to the estate of her deceased husband, must remain under a perpetual obligation to preserve her chastity; and this inference is not only confirmed by the very wording of the text of Bridha Menu upon

which he relies, but also by vv. 37 and 38 in which he says that 'the widow who is suspected of incontinence must' be excluded, and that she who is not supposed likely to be guilty of that offence is alone entitled to take the wealth of her deceased husband.

"It is true that there is no special discussion on this point in the Dayabhaga, but the reason of this omission is obvious. The authority of the Mitakshara, it should be remembered, was at one time supreme even in Bengal, and as the author of the Dayabhaga did not intend to dispute the correctness of all the propositions laid down in that treatise, we need not be at all surprised at his silence in regard to some of them. It is for this reason that the Mitakshara is still regarded in the Bengal school as a very high authority on all questions in respect of which there is no express conflict between it, and the works prevalent in that school as may be seen from the remarks made by the Privy Council in the case already referred to.

'But be this as it may, it seems to be clear, upon the authority of the very texts relied upon by the author of the Dayabhaga in order to establish the widow's right of succession, that both the accrual and the continuance of that right are absolutely dependent upon the preservation of her chastity. The very first text quoted by him is one from Vrihasputtee, which says :—

'In scripture and in the Code of Law, as well as in popular practice, a wife is deemed by the wise as half the body of her husband equally sharing with him the fruits of pure and impure acts. Of him whose wife is not deceased half the body survives. How then should another take his property when half his person is alive. Let the wife of a deceased man who left no issue take his share notwithstanding kinsman, a father, a mother, or uterine brother be present. Dying before her husband, a virtuous wife partakes of his consecrated fire; or if her husband die before her, she shares his wealth—this is primeval law. Having taken his moveable and immoveable property, the precious and the base metals, the grains, the liquids and the clothes, let her duly offer his monthly half-yearly, and other funeral repasts. With presents to his manes, and by pious liberty, let her honor the paternal uncle of her husband, &c.'—(Dayabhaga, c. XI, s. 1, v. 2.)

"The word *virtuous* in the above passage is a mistranslation. The original contains

two words, 'potibrotā' and 'shadhee,' the former meaning, devoted to the *brotā* or ceremony of promoting the happiness of her husband; the latter, chaste.

"According to this text it is clear that it is the chaste widow alone who is competent to perform the religious and other acts conducive to the spiritual welfare of her husband, and, therefore, entitled to succeed to his estate after his death in default of male issue. It is the chaste, and not the unchaste, wife who is regarded 'in the Hindoo scriptures in the Code of Hindoo Law,' and in the popular practice prevailing among the Hindoos, as half the body of her husband, and it is she and she alone who is entitled to partake of his consecrated fire, to offer his monthly, half-yearly, and other funeral repasts, as well as to do those pious acts of liberality which are necessary for the salvation of his soul. An unchaste woman is even as a corpse for every act done by her is, in the eye of the Hindoo law, absolutely null and void so far as religious efficacy is concerned; and we might here refer to the case of *Sbyam Lall Dutt v. Sadhoomoney Dasee*, reported in p. 362 of the 5th B. L. R., in which it was expressly held that an adoption made by an unchaste widow is invalid, notwithstanding that it was made in pursuance of a permission given to her by her husband.

The next text to which we wish to refer is that of *Bridha Menu*, which says :—

'The widow of a childless man keeping unsullied her husband's bed, and persevering in religious observances, shall present his funeral obligation and obtain his entire share.'—(Dayabhaga, c. XI, s. 1, v. 7.)

"Who *Bridha Menu* was, or whether he was a real or a fictitious personage, it is needless for us to enquire. It is sufficient to say that the above passage is recognized by the author of the Dayabhaga as one of the texts upon which the widow's right of succession is based; and that it shows beyond the possibility of a doubt that the preservation of her chastity is a condition precedent to the widow's capability to offer oblations to her deceased husband; and, therefore, to her right to take his estate.

'The third text is one of *Vyasa*. It says :—

'After the death of her husband, let the virtuous widow observe strictly the duty of continence; and let her daily, after the purification of the bath, present water from



the joined palms of her hands to the manes of her husband. Let her day by day perform with devotion the worship of the gods, and specially the adoration of Vishnu, practising constant abstemiousness. She should give alms to the chief of the venerable for increase of holiness, and keep the various fasts, which are commanded by sacred ordinances. A woman, who is assiduous in the performance of duty, conveys her husband, though abiding in another world, and herself to a region of bliss.—(Dayabhaga, c. XI, s. 1, v. 42.)

"This is the path of duty which the widow is enjoined to follow throughout her life, and it is only by steadily persevering in that path that she can promote the spiritual welfare of her husband. It is to be borne in mind that her capacity to promote such welfare arises only on the date of her widowhood, and not before, as may be seen from v. 43 of s. 1, c. XI of Colebrooke's Dayabhaga, and it is for the purpose of enabling her to secure the attainment of this object, as well as for another to which we shall presently refer, that this estate is made over to her. Accordingly, the author of the Dayabhaga, after citing the text of Vyasa above quoted, says:—'Since by this and other passages the wife rescues her husband from hell, and since a woman doing improper acts through indigence causes her husband, to fall into a region of horror, therefore, the wealth devolving upon her is for the benefit of the owner. Consequently, the wife's succession is proper.'—(Dayabhaga, c. XI, s. 1, v. 44.)

"It will be seen that the author of the Dayabhaga repeatedly calls the deceased husband the owner of the estate, notwithstanding the widow's succession, she being in possession of it merely as half his body, and solely for his benefit. It is clear, therefore, that, according to the author of the Dayabhaga, there are two reasons for allowing the widow to succeed to the estate of her deceased husband, namely, first, because she can rescue him from hell by living in the mode prescribed by the Hindoo abasters; and, secondly, because she might cause his soul to fall into a region of torment by doing improper acts through indigence. Both these reasons, however, pre-suppose the 'strictest observance by her of the duty of continence,' and it is for this reason that such observance has been put forward by Vyasa as the very

first condition which she must satisfy in order to fulfil the requirements of her position.

"The last text we wish to refer to is one of Catayana cited in the following passage of the Dayabhaga.

"But the wife must enjoy her husband's estate; she is not entitled to make a gift or mortgage or sale of it. Thus Catayana says:—'Let the childless widow keeping unsullied the bed of her lord, and abiding with her venerable protector, enjoy with moderation the property after his death.'—(Dayabhaga, c. XI, s. 1, v. 56.)

"This passage shows clearly not only that the widow's right is a mere right of enjoyment, the word 'enjoyment' being understood in the sense explained above, but that the exercise of that right is absolutely dependent on her 'keeping unsullied the bed of her lord.' The participial form of the word keeping, i. e., continually preserving, which is also the form used in the original (पालयन्ती) *Palayuntee*, proves conclusively that the injunction is one in the nature of a permanently abiding condition which the widow is bound at all times and under all circumstances to satisfy, and the right of enjoyment conferred upon her being expressly declared to be subject to such a condition, every violation of it must necessarily involve a forfeiture of that right. It has been already shown that the widow's right of succession is dependent solely and exclusively on the authority of special texts, and it would not certainly lie in her mouth to say that she is entitled to enjoy that right without being bound by the conditions which those very texts have imposed upon her.

"It has been said that the same reasoning would apply with equal force to the other portion of the text which requires her to abide with her venerable protector. But this is not a separate condition by itself. It is, in fact, merely ancillary to the preceding condition, namely, that of keeping unsullied the bed of her lord, and is simply as a means to an end. Indeed, it was at one time a matter of grave doubt whether a widow, who has voluntarily left the protection of her husband's kinsmen is entitled to retain his estate. The question was ultimately settled in the affirmative by the Privy Council. But the decision, which is reported in p. 97, *Shama Churn's Vyavasta, Durpan, Kashi-nath Bysack v. Horasconderee Dossee*, was

expressly put upon the ground that the widow in that particular case had not changed her residence for unchaste purposes. This decision lends considerable support to our view, though in an indirect way, for if, as has been argued in this case, a widow who has once succeeded to the estate of her deceased husband is not liable to forfeit that estate by reason of unchastity, neither the Pandits, who were consulted in that case, nor the Lords of the Judicial Committee, by whom it was ultimately disposed of, would have put their opinions upon the narrow ground above referred to.

"The other authorities current in the Bengal school are still more explicit on the point. Sreekissen Turkolunkar, whose authority has been held in some cases to be superior even to that of the author of the Dayabhaga, expressly declares,—Shadhee, chaste, otherwise the right ceases."

"The word 'ceases' in the above passage stands for the word *nibirth* (निवृत्ति) in the original; and as this last-mentioned word clearly means the extinction of some pre-existing thing, it seems to be clear that, in the opinion of Sreekissen Turkolunkar, loss of chastity is a cause of forfeiture.

"Rughoo Nunduna also, the author of the Dayatutta and of several other works, which are regarded as high authorities in the Bengal school, appears to be of the same opinion.

"After citing the text of Catayana above referred to, he says, 'Shadhee,' not unchaste. Therefore, it is said in the story of Pannuka in the Hurryvansa :—

"Oh Arundhati! gifts, fastings, and other virtuous acts of an unchaste woman are vain, &c., &c.

"This passage has been already quoted *in extenso* in an earlier part of this judgment, and we have only to observe in this place that the author of the Dayatutta refers to it for the purpose of showing that the Hindoo law insists upon the virtue of chastity as a *sine qua non* to the widow's enjoyment of the property inherited by her from her husband, because the moment she commits an act of unchastity, she becomes absolutely incompetent to confer any spiritual benefit upon her deceased husband, or as the text itself says, she 'loses from that time the fruits of religious acts, and is doomed to hell.'

"Lastly, Juggernath Turkopunchanun, one of the most modern authorities of the Bengal school, expressly says—"Since a

woman has not yet performed the duties of widowhood and the like, how can she have a title to the inheritance immediately after the death of her husband? She has an immediate title because she is disposed to perform those duties; but afterwards if her propensities happen to change, she forfeits the right she had fully possessed."—(Colebrooke's Digest, vol. 3, p. 479.)

"And again, in p. 576 of the same volume :—

"The childless widow' considering that the several property of a woman may be resumed (v. 405) if she do not preserve unsullied the bed of her lord, the legislator expounds this text. The maxim being true in the case of several property over which a woman has exclusive dominion, the same is equitable in respect of an estate devolving on her by the failure of male issue."

"It is further to be observed that the Hindoo Law goes to the length of declaring that a woman who is guilty of unchastity is liable to forfeit even her *streedhun* or peculiar property. Thus Nareda says :—'Among brethren if one die naturally or civilly without male issue, the rest may divide his property among themselves, excepting the wealth of his wives, and shall support them until they die, provided they preserve unsullied the bed of their husbands. But from other widows the heirs may resume their exclusive property.'—(Nareda Sunhita, p. 21; Colebrooke's Digest, vol. 3, p. 474.)

Catayana also lays down the same rule :—

"But a wife who does malicious acts injurious to her husband who has no sense of shame, who destroys his effects, or who takes delight in being faithless to his bed is held unworthy of the property above described."—(Colebrooke's Digest, vol. 3, page 585.)

"In commenting upon this passage, Juggernath says :—'Acts injurious to her husband, the administering of poison or the like, who has no sense of shame, who goes to other towns on false pretences or the like, who destroys his effects, who incurs expenditure for immoral purpose.'—(Colebrooke's Digest, vol. 3, p. 586.)

"Nor is this doctrine wanting in the support of the commentators. We have already seen what Juggernath says upon the subject; and the following passages will show that several other commentators also are of the same opinion :—'Therefore, the property given

to a chaste woman by her father-in-law and others shall not be resumed by the relatives as is declared by Vrihaspattee. If she prove otherwise, the property given to her may be resumed. Thus Catayana says :—It is the wife devoted to her husband who is entitled to enjoy the property given to her. If she is not so devoted, she is entitled to maintenance. But she who is mischievous or shameless, or who destroys his effects, or who is unchaste, will not get the property.—(Vira Mitradoy, p. 208).

"Rughoo Nunduna also relies in p. 53 of his *Dayatutta* upon the text of Nareda quoted above; and what is still more important for the purposes of our decision is that he relies upon it with express reference to the estate inherited by a widow from her deceased husband.

"The author of the *Vivada Chintamoney*, after citing the text of Catayana, 'But a wife who does malicious acts, &c.' says :— 'Who does malicious acts, &c. This shows that the kindred should demand even the peculiar property from such a woman.'—(Prosono Coomar Tagore, *Vivada Chintamoney*, p. 266).

"The word *even* (एव) is omitted in Baboo Prosono Coomar's translation, but it goes to show most distinctly that the rule is *a fortiori* applicable to every other kind of property belonging to a woman.

"It may be conceded that the Courts of Justice in this country are not bound to enforce this rule, inasmuch as it has no necessary connection with the law of inheritance, but it throws considerable light on the question we have to determine in this case. If we once admit that want of chastity is in the eye of the Hindoo law a ground of forfeiture in the case of a woman's *streedhan* over which she has an almost absolute dominion, the inference is almost irresistible that the same rule must apply, at least with equal force, to the case of property given to a widow for a special purpose, the fulfilment of which is altogether inconsistent with the loss of her chastity.

"Indeed, the Hindoo law goes on to declare that an unchaste woman is not entitled even to maintenance. We do not wish to multiply authorities on this point, and we will, therefore, conclude these remarks by quoting the following passage from the *Dayabhaga*, in which it is expressly laid down that an unchaste woman should be expelled from the

family-house :— 'Their childless wives conducting themselves aright must be supported. But such as are unchaste should be expelled *प्रातिष्ठा*.'—(*Dayabhaga*, c. V, v. 19.)

"Of course, the childless wives referred to in this passage are the wives of persons who are themselves disqualified to inherit, but there seems to be no reason whatever why the same rule should not apply with equal force to the wives of those members of the family who are fortunate enough to inherit the family estate.

"It has been said that some of the texts quoted above refer to many other virtues, besides chastity, and that the argument in favor of forfeiture would be equally strong in the case of the widow's derelictions in respect of those virtues, as in the case of her failure to preserve her chastity. But the answer to this objection is very plain. A chaste widow, who has failed to perform her duties to-day, may perform them on some future date. But a widow, who has once sullied the bed of her lord, not only 'causes her husband's soul to fall into a region of torment,' but becomes 'from that time' absolutely incompetent to do anything for his spiritual welfare. All her fastings and acts of piety become fruitless and vain, and as she no longer remains half the body of her husband, her estate must necessarily come to an end.

"It has been further said that adultery is an expiable offence under the Hindoo shasters. Whether it is so or not appears to be a doubtful question.

"Culluka Bhutto, the celebrated commentator upon Menu, makes the following observations upon a text of the latter, which has been already quoted in this judgment :— 'None of the ceremonies at the birth of children, and so forth, are performed for females with holy texts. This limitation of law is fully settled, hence through the want of solemn rites, accompanied with holy texts; they are not divested of sin; through the want of evidence of law and scriptures, they are not acquainted with the system of duties, and having no expiatory texts, that is being incapable of expiating a sin actually committed since they are debarred from the silent repetition of expiatory texts; women are as foul as falsehood itself, &c.'—(*Colebrooke's Digest*, vol. 2, p. 391.)

"Some of the modern writers, however, appear to be of a different opinion, though,

even according to them, expiation is not permitted after the birth of illegitimate children, which is in fact what has happened in the present case. But we do not wish to meet this objection upon this narrow ground. Assuming that expiation is allowable in a case like the present, we are unable to see how that circumstance can affect our decision one way or the other. Expiation might save the widow from the future punishments prescribed for the act itself, but there is no authority in the Hindoo law, so far as we are aware of, to support the contention that it can control the operation of the special texts, under which she inherits, or that it can render her chaste after she has once become unchaste. It is the chaste widow, and the chaste widow alone who is allowed to inherit the estate of her deceased husband, and she is expressly told to use that estate solely and exclusively for his spiritual welfare, subject to the condition of 'preserving his bed unsullied'; once unchaste, she must remain unchaste for ever, and therefore for ever incompetent to satisfy the condition upon which her title depends.

"Indeed, if expiation can bar the forfeiture, it can bar the disinheritance also; but there is no authority whatever to support either of these propositions. The Hindoo law, it should be remembered, recognized the institution of *suttee*. That barbarous practice was current in the country down to a very recent date, when it was abolished by the British Government. But barbarous as it was, it serves as a valuable guide to the true spirit of that law on the particular subject now before us. If the widow wishes to survive her husband, and to represent him and his estate as half his body, she must remain a *suttee* or chaste woman throughout her life, and it is upon this express condition that she is allowed to take and to enjoy that estate in default of male issue. Indeed the Hindoo law is, as we have already shown, extremely averse to give property to women, and one of the special reasons assigned for making an exception in the widow's favor is, that by obtaining property she would be able to avoid temptations of want, and so preserve her chastity, and thereby save her husband's soul from the torments of 'a region of horror.' The case of a widow appointed to raise up issue for her husband, which has already been cited from the *Mitakshara*,

appears to have a very important bearing upon this point. Such an appointment was not, at the time when the work was written, without some support from the Hindoo shasters, though it was condemned by popular practice as the author himself tells us, and it is, therefore, clear that no amount of *prauschitto* or penance can restore a widow guilty of *unchastity* to the same position as one who is appointed to raise up issue by the express command of her husband. If expiation is allowable in the one case, it would be equally allowable in the other; and if a widow who has raised up issue cannot recover the inheritance by expiation, the unchaste widow cannot, merely by reason of such expiation, claim to stand in a higher position.

"But there is another difficulty of a still more formidable character which must be overcome before this objection can prevail against our view. The widow having, by reason of her unchastity, once become incompetent to use the estate of her deceased husband, her right to use that estate ceases; and as, according to a well-known principle of Hindoo law, property can never remain in abeyance, the estate must immediately vest in the nearest heir of her husband; and having once gone there, no subsequent expiation on her part can bring it back to her.

"It has been said that, according to the Hindoo law, an estate once vested cannot afterwards be divested. But not only is this rule, not without exceptions, but its application must necessarily depend upon the nature of the estate in question. In the case of male heirs who become the true owners of the property in the full sense of the term, such application cannot give rise to any difficulty, although even in such cases the Hindoo law recognizes certain exceptions to which it is not necessary here to refer. But the case of the widow stands upon a quite different footing. Her estate is one, as we have already shown, essentially in the nature of a trust estate, for she can use it only for particular purpose, and for no other; and if she has by her own conduct rendered herself totally incapable of using it for that purpose, the divesting must follow as a necessary consequence.

"Much stress has been laid upon the fact that unchastity is not included in the chapter on Exclusion from Inheritance either

in the *Mitakshara*, or in the *Dayabhaga*. The original works, however, are not divided into chapters at all. But be this as it may, the answer to this objection is obvious. The grounds referred to are general grounds applicable to both classes of heirs—male and female. But the widow's case is of a special nature. As a woman she would have been altogether excluded from the inheritance, but for the special texts in her favor, and as she takes the estate under those texts, she must abide by the special conditions therein laid down in addition to the general conditions to which all other heirs are subject. The preservation of her chastity is, strictly speaking, more in the nature of a permanent condition attaching to the right itself than a ground of exclusion from inheritance. All married wives are not allowed to inherit. It is only those who are entitled to the rank of 'putnees,' and of these, those only who are chaste, are allowed to inherit at all, and they are merely allowed to 'use' the estate in a specified mode so long as they continue chaste. Those married wives who are not entitled to the rank of putnees are allowed maintenance only, but even that is resumable at the instance of the lawful heir if they prove unchaste, as may be seen from v. 48, s. I, c. XI, of the *Dayabhaga*.

"It may be further remarked that this objection would apply with equal force to the case of a widow who is found unchaste at the time when the succession opens out, but that such a widow has no right to inherit under the Hindoo law appears to be almost universally admitted.

"We will now proceed to discuss the two remaining classes of authorities, namely, the decisions of Courts of Law, and the opinions of European writers on Hindoo law.

"So far as the decisions are concerned, the earlier ones, supported as they are by the *dicta* of the *Pundits* then consulted, are all in support of our view. The first case in point of date is reported in the 20th p. of the 2nd vol. of *Macanaghten on Hindoo Law*. That case arose in the district of Hooghly, and it was distinctly held therein that an unchaste widow forfeits all right to her husband's estate. The next case reported in that volume is also of considerable importance. It arose in the 24 *Pergunnahs*, and it was expressly held therein that an unchaste widow is liable to be expelled from the family-house of her husband. The next case

is reported in p. 112 of the same volume. In this case it was held that an unchaste widow is not entitled to maintenance from her husband's brother, even though she may have resigned her right in the property of her husband in his favor in consideration of such maintenance. The case of *Ranee Bussunt Koomaree v. Ranee Kumal Koomaree*, reported in p. 144, 7 *Sel. Rep.*, is also in support of his view as far as it goes, and it was evidently treated as a case of elopement. The case of *Rajkoomaree Dossee v. Golabee Dossee*, *Sud. Rep.*, 1858, p. 1891, is also in point, so far as the question of disinherison is concerned. It is true that in this case there was an allegation of desertion by the husband in his life-time, but this allegation was considered merely as a piece of evidence on the only issue of fact which was raised in it, namely, whether the woman was chaste or otherwise, as may be seen from the judgment itself. In the case of *Doe d Radhamonee Raur v. Nilmonnee Doss*,\* it was unanimously held by Chambers, C. J., Hyde, Jones, and Dunkin, Judges, that an unchaste widow forfeits all her rights in the estate of her deceased husband. The case of *Doe d Saum Monee Dossee v. Neemy Churn Doss*† is certainly in the other way. But no authorities are cited in the judgment, nor does it appear that the earlier cases were brought to the notice of the learned Judge by whom it was passed, as may be seen from the concluding words of his judgment, in which he says:—"Further, in this case the widow had been in rightful possession for a long time, and the Court would be disinclined to disturb her in the absence of any decision of a Court of Law showing that such a person for such reason as above stated might be expelled from possession."

"The last case is that of *Srimati Matangini Debi v. Srimati Joy* [Kali† (5 B. L. R., p. 491.) but for the reasons above stated, we feel ourselves bound to say that it is contrary to the Hindoo law.

"As for the European writers, Mr. Colebrooke is undoubtedly the highest among them in point of authority, and his opinion as reported in 2 *Strange*, p. 272, appears to have been that, although unchastity is a cause of disinherison, a widow who has once

\* *Montrion's Hindoo Law Cases*, 314.

† 2 *Taylor & Bell*, 300.

‡ 14 *W. R.*, O. Jur., Ap., 23.

succeeded to the estate of her deceased husband, cannot be afterwards divested of it, except for loss of caste, unexpiated by penance and unredeemed by atonement. This opinion, however, was given in a case which originated in Trichinopoly, nor does it appear that it was given with any reference to the authorities current in the Bengal school. It is also to be observed that the question propounded in that case contains no specification of the particular bad conduct of which the widow was guilty. But be that as it may, there is no authority cited to support the proposition that loss of caste is the only ground of forfeiture recognized by the Hindoo law, or that penance and atonement can prevent forfeiture any more than they can prevent disinherison. The great name of Mr. Colebrooke is, no doubt, an authority entitled to the highest respect, but for the reasons above stated, we are constrained to say that in this particular instance, it cannot be taken as conclusive. We wish further to remark that Mr. Ellis of Madras, who also was consulted in that very case, gave an opinion directly supporting our view, as may be seen from one of the notes subjoined to it. As for the opinion of Sir Thomas Strange, it seems to be based entirely upon that of Mr. Colebrooke, and we do not, therefore wish to dwell upon it any further.

"The opinion of Sir William Macnaghten seems to be in support of our view, as may be seen, not only from the remarks made by him in p. 19 of the first vol. of his work on Hindoo law, in which he distinctly says that 'a widow in possession of her husband's estate is nothing more than a trustee for certain purposes,' but also from the cases which are cited by him as leading authorities in the second volume of that work, and which have been already commented upon by us. The only other European writers we wish to refer to are Elberling and West & Buhler. Both these authorities, however, are in support of our opinion as may be seen from the remarks contained in pp. 73 and 75 of Elberling's Treatise on Inheritance in p. 99, of West & Buhler's works on Hindoo law.

"Supposing, however, that the preceding conclusion is correct as far as it goes, the next question we have to determine is whether this case falls under the purview of Act XXI of 1850.

"We are of opinion that this question ought to be answered in the negative. This Act was passed for extending the principle of Section 9 Regulation VII of 1832, of the Bengal Code throughout the territories subject to the East India Company, and its preamble is as follows:—

"Whereas, it is enacted by Section 9 Regulation VII of 1832 of the Bengal Code, that 'whenever in any civil suit the parties to such suit may be of different religious persuasions when one party shall be of the Hindoo, and the other of the Mahomedan persuasion, or where one or more of the parties to the suit shall not be either of the Mahomedan or Hindoo persuasions, the laws of those religions shall not be permitted to operate to deprive such party or parties of any property to which, but for the operation of such laws, they would have been entitled.' And, whereas, it will be beneficial to extend the principle of that enactment throughout the territories subject to the Government of the East India Company."

"These words seem to prove conclusively that the one object which the Legislature had in view in passing the Act was to extend the principle of religious toleration, and the inference is, therefore, almost irresistible that it could not have been intended to govern a case like the present. The violation of conjugal duty is an offence against universal morality, and it is upon this ground that contracts based upon adulterous considerations are declared by Courts of Justice to be absolutely null and void. To hold that an unchaste woman is entitled to claim the same privilege as a person who has conscientiously changed his religion would be manifestly opposed to public policy, and we are, therefore, of opinion that the construction of the Act ought to be limited to the furtherance of the great principle enunciated in its preamble, and not extended to a case of positive immorality like the one before us. It has been often remarked that the preamble of an Act is the key to its interpretation, and we do not see any reason whatever why we should extend the operation of the Act in question beyond the limits proposed by its framers, and that at the risk, as Mr. Scone puts it in his judgment in the case of *Rajkoomaree Dossee v. Golabee Dossee*, 'of relaxing the bonds which tend to secure and elevate the relations of married life.'



"But there are two other reasons, each of which seems to lead to the same conclusion.

"In the first place it is clear that Act XXI of 1850 cannot possibly give to any party any right higher than that to which he or she is entitled under the law from which that right is derived. Such a construction would be directly contrary to the principle laid down in the preamble.

"The Hindoo widow takes the estate of her deceased husband under the Hindoo law, and that very law prescribes in so many terms that she should remain chaste, and use it for a particular purpose, and for no other.

"If, therefore, she has done an act, the consequence of which is to render her absolutely incompetent to use that estate, a forfeiture would be inevitable, notwithstanding the provisions of Act XXI of 1850.

"That Act cannot possibly give her any estate higher than that of a Hindoo widow; and if she is no longer in a position to use that estate in the only mode sanctioned by the Hindoo law, her right to it must die a natural death.

"Suppose for instance, that a Hindoo is appointed the shebait of a Hindoo temple, and that the endowed property is made over to him subject to the condition of using it for the benefit of the idol, and for no other purpose. If such a person becomes a Mahomedan, and thereby renders himself incompetent to fulfil the conditions of his appointment, can it be contended that Act XXI of 1850 would entitle him to retain the trust property notwithstanding the conversion?

"Suppose, again, that a Hindoo widow, after having succeeded to the estate of her deceased husband, becomes a convert to Mahomedanism, and is about to spend a portion of the Government securities left by him, in order to defray the expenses of a pilgrimage to Mecca. If the reversioner brings a suit for restraining her from using the securities for such a purpose, can the Court refuse to grant him the relief sought for? We apprehend not, and if this is conceded, the same principle would equally apply to every other use made by such a widow of her husband's property, for she has, by reason of her very conversion, incapacitated herself from using that property in the only mode in which she could have used it. The Hindoo law, it should be remembered, makes no distinction between the corpus and the income of the estate. On the contrary, we have

shown already that they are both governed by the same texts.

"It should not be objected that the above view of a Hindoo widow's estate is too much mixed up with the Hindoo religion. This is to a certain extent unavoidable in dealing with all questions arising out of the Hindoo law. The legislators of the Hindoos were also their priests, and it is in consequence of this circumstance, that the Hindoo law, at least that portion of it which relates to inheritance, is placed entirely upon the basis of the Hindoo religion. The institution of marriage is still regarded by the Hindoos as a sacrament. It is the foundation of the family,—one of their dearest and most cherished institutions,—and as such the foundation of their society, for society after all is an association of families. To preserve the purity of the conjugal relation was one of the chief objects which the Hindoo legislators had in view, nor need we be surprized at the stringency of the provisions made by them to secure that object, when we take into consideration the condition of Hindoo woman in general. Their ignorance and their want of experience render them liable to be easily deceived, and it is for this reason that the Hindoo law has put so many restraints upon them. To remove those restraints until better ones are substituted in their place, would be to introduce a dangerous innovation, nor do we see any reason in justice or equity why the estate of the Hindoo widow should not be regulated by the law from which it is derived. We are bound to administer the Hindoo Law as we find it, and we have, therefore, no power to refuse to give effect to that law, merely, because it happens to be mixed up with the Hindoo religion.

"Lastly, there seems to be nothing even in the body of the Act, which can render it applicable to the case of a Hindoo widow who is guilty of unchaste conduct. It consists of one Section only, and that Section is as follows:—'So much of any law or usage now in force within the territories subject to the Government of the East India Company, as inflicts on any person forfeiture of rights or property, or may be held in any way to impair or affect any right of inheritance by reason of his or her renouncing, or having been excluded from the communion of any religion, or being deprived of caste, shall cease to be enforced as law.'

"Now the case of an unchaste widow does not fall within any of the three contingencies contemplated by this Section. That it is not a case of renunciation of religion, or of exclusion from the communion of any religion, is almost self-evident; nor can it be said to be a case of loss of caste. Loss of caste might be in some cases the consequence of loss of chastity, but it is not a necessary consequence. The guilty parties might both belong to the same caste, and in such a case there need not be any loss of caste at all, nor is there anything in the Hindoo Law which says that an unchaste widow forfeits her right, because she has lost her caste. She forfeits it because she is not a 'shadhee' or chaste woman, and there is nothing in Act XXI of 1850 to provide for her case. The Hindoo who is born blind, or destitute of any other sense or member of body, cannot inherit, notwithstanding the provisions of this Act, and his case affords an additional ground for holding that its operation was purposely limited to cases involving a change of religious persuasion as indicated by the preamble.

"The Act for the re-marriage of Hindoo widows (No. 15 of 1856) also tends to throw same light on this point. That was passed nearly six years after the promulgation of Act XXI of 1850, and it was passed for the express purpose of removing all legal obstacles to the marriage of Hindoo widows. Now it is clear that a Hindoo widow who marries a second husband, loses under that Act all the rights and interests which she had in her former husband's estate, and it is scarcely reasonable to suppose that such a provision would have been introduced in an Act passed with such an object, if Act XXI of 1850 had the extended operation which is sought to be given to it. We admit that we have, strictly speaking, no right to use this circumstance as an argument by itself, for the Legislature might in 1856 have misconstrued what it had done in 1850. But we refer to it for the purpose of showing how the law was understood to be in 1856, not only by the Legislature itself, but even by that portion of the Hindoo community at whose special request Act XV of that year was passed.

"The conclusion arrived at by us on both these points is, however, contrary to that arrived at in the case of *Srimati Matangini Debi vs. Srimati Joy Kali*, B. L. R., vol. 5,

p. 466, and we therefore refer this case to a Full Bench for an authoritative ruling upon the following questions:—

1st.—Whether, under the Hindoo law as administered in the Bengal school, a widow, who has once inherited the estate of her deceased husband, is liable to forfeit that estate by reason of unchastity?

2nd.—Whether the forfeiture, if any, is barred by Act XXI of 1850."

The case came on for hearing under the order of reference before a Full Bench of five Judges, their Lordships without delivering judgment referred the case for the opinion of a Full Bench of all the Judges.

In this case I have already expressed my opinion at considerable length in the order of reference, and as I still adhere to that opinion, I do not think it necessary for me to do anything more than to make a few observations merely by way of supplement:

(1.) It is, I believe, a proposition beyond all dispute, and indeed it was fairly conceded at the bar, that an unchaste widow has no right to succeed to the estate of her deceased husband, irrespective of any considerations arising from expiation or condonation. Baboo Shama Churn Sircar says, it is true (*see Vyavastha Durpana*, page 1016, *Vyavastha No. 663*) that loss of chastity operates as a cause of disinherision in those cases only in which there has been no expiation by penances or condonation by the husband. But the only authority which Baboo Shama Churn has been able to cite in support of his *Vyavastha* is the opinion of Mr. Colebrooke in the *Trichinopoly* case already noticed by me in the order of reference. Now, there is nothing whatever in that opinion to warrant the view taken by the Baboo. On the contrary, Mr. Colebrooke lays it down as undoubted law that an unchaste widow has no right to inherit her husband's property, without the slightest reference either to expiation or to condonation; and this opinion is supported not only by all the decided cases on the point, but also by the express provisions of the Hindoo law itself. According to that law, it is the *shadhee* or chaste widow alone who is entitled to succeed to the estate of a man who dies without leaving any male issue, and as it is beyond all question that neither expiation nor condonation can convert an unchaste woman into a chaste one, the opinion of Baboo Shama Churn, which, it should be



remembered, does not possess any independent value of its own, must necessarily fall to the ground.

So far, therefore, the ground being clear before us, I confess I feel considerable difficulty in understanding how, in the face of the above concession, and upon the authorities which we are bound to follow in this case, it can be contended that loss of chastity does not operate as a cause of forfeiture also.

Of all the authorities above referred to, the Dayabhaga of Jumata Vahana, the acknowledged founder of the Bengal school, is undoubtedly the highest, and it is therefore to the Dayabhaga that I shall first direct my attention. I do not wish, however, to go over all the texts quoted and relied upon by the author of that treatise in discussing the widow's right of succession. I will refer to two of those texts only, namely, the text of Vrihat Menu, cited in verse 7, section 1, chapter XI of Mr. Colebrook's translation of the Dayabhaga, and that of Katayana, cited in verse 56 of the same section and chapter. These two verses are as follows:—

(1.) "The widow of a childless man, *keeping unsullied her husband's bed*, and preserving in religious ceremonies, shall present his funeral oblation, and obtain his entire share."

(2.) "Let the childless widow, *keeping unsullied the bed of her lord*, and abiding with her venerable protector, enjoy with moderation the property until her death. "After her death let the heirs take it."

It will be observed that the first of these two texts is cited by the author of the Dayabhaga for the purpose of establishing the widow's right to succeed to the whole estate of her husband, and not merely to a portion of it, barely sufficient for her maintenance, and the second, for that of defining the nature and extent of the interest which devolves upon her by virtue of such right, and which, as he afterwards explains to us, in terms too plain to be misunderstood, is not being more than that of a mere holder for the benefit of her husband's soul. Both the texts, however, speak of the widow's obligation to preserve her chastity in precisely the same terms, the words used for that purpose in both of them being exactly the

same in the translation, as well as in the original. If, therefore it be once conceded, as it has been, and as I think it must be, that the fulfilment of that obligation is a condition precedent to the widow's right to take her husband's estate under the first text, I cannot understand upon what principle of construction it can be contended that such fulfilment is not also a condition precedent to her right to enjoy that estate under the second. Surely, we are bound to attach the same meaning to the words "keeping unsullied the bed of her lord" in the text of Katayana, as we do to the words "keeping unsullied her husband's bed" in the text of Vrihat Menu; and if we once do so, what reason can we assign for holding that the injunction as to chastity is binding in the one case, and not in the other. So far as the principle upon which that injunction is based is concerned, it cannot be contended for one moment that there is the slightest difference between the two cases. I have already shown in the order of reference, and I may add that the correctness of that portion of my judgment has not even been questioned in the course of the argument, that an unchaste widow is absolutely incompetent to render any spiritual service to her deceased husband, and as the widow's estate is, under the express provisions of the Hindu law, destined *solely and exclusively* for such service, it requires no argument to show that if loss of chastity operates as a cause of disinheritance, it must also operate as a cause of forfeiture, and for precisely the same reason. Why then are we to hold that the condition of chastity is a valid and binding condition under the texts of Vrihat Menu, but not under that of Katayana? Suppose, for instance, that a Hindoo dies, leaving his property to his widow by a will which contains a distinct provision, to the effect that she should, while continuing to keep the testator's bed unsullied, use the property, until her death, for his spiritual benefit, and for no other purpose whatever. If the widow afterwards becomes unchaste, and thereby renders herself absolutely incompetent to use the property for the only purpose for which it was given to her, can it be said there would be no forfeiture in such a case. I apprehend not.

Baboo Mohini Mohun Roy, who argued this case with great ability on behalf of the appellant, finding this difficulty staring him

in the face, attempted to get rid of it by certain arguments which, I am bound to say, are more ingenious than sound. He tried first of all, to cast suspicion upon the authenticity of the text of Katayana, upon the ground that the treatise of which it forms a part is not forthcoming. But to whatever cause the Baboo's failure to procure a copy of the Institutes of Katayana may be ascribable, it is perfectly clear that the authenticity of the text in question does not admit of any doubt or dispute. The very fact that it is quoted with approbation by the author of the Dayabhaga is a conclusive reputation of the Baboo's argument; and if further authority is needed, I have only to refer to the decision of the Privy Council, reported in page 514, XI Moore, in which that very text is distinctly characterized by their lordships as one of "undoubted authority," and that for the purpose of determining the nature and extent of the interest which the widow acquires in her husband's estate, under the provisions of the Hindu law.

The next argument advanced by Baboo Mohini Mohun was that, in giving effect to the text in question, we should not go beyond the particular purpose for which it is cited in the Dayabhaga, and that as the author of that treatise has not made any comments of his own upon the words "keeping unsullied the bed of her lord," it must be presumed that he has rejected that portion of the text which contains those words, as possessing no binding force whatever. This, I confess, is rather a novel mode of interpreting a work like the Dayabhaga, which is professedly a mere commentary on the texts of the ancient Rishes, the acknowledged fountain head of the Hindoo law. But be that as it may, let us see for what particular purpose the author of the Dayabhaga has cited the text under our consideration. That purpose was, as he himself tells us in the very verse in which the text is quoted, to establish the proposition that "the widow must *only enjoy* her husband's estate." What this right of enjoyment means he explains to us in the subsequent verses in which he says in the most express terms that every use made by the widow of the property inherited by her from her husband, which is not conducive to his spiritual welfare, is an act of waste. Are we then to suppose that at the very time when the

author of the Dayabhaga was appealing to the text of Katayana as an authority for showing that the widow's estate is destined solely and exclusively for the spiritual welfare of her husband, he was silently engaged in repudiating the binding force of that portion of the text which imposes upon her the obligation of "keeping unsullied the bed of her lord," knowing full well, as he must be supposed to have done, that the strictest fulfilment of that obligation is indispensably necessary to enable a Hindu woman to promote such welfare. Such a course of procedure is, on the very face of it, so utterly self-contradictory, that before we can impute it to a writer like the author of the Dayabhaga, we must have some reason infinitely stronger than that put forward by the pleader for the appellants. With reference to that portion of the argument which is based upon the absence of any express comments by the author of the Dayabhaga upon the words "keeping unsullied the bed of her lord," I have to observe that it is entitled to no weight whatever. The pleader for the appellant seems to forget that the same remark is equally applicable to similar portion of the texts of Vrihat Menu and other *Rishes* which are quoted in the Dayabhaga for the purpose of establishing the widow's right of succession, and yet it is admitted on all hands that under those texts an unchaste widow is not entitled to inherit her husband's property. Nor need we go very far to find out the reason of this silence on the part of the author of the Dayabhaga. His functions, it should be borne in mind, were those of a mere commentator; and it was by no means incumbent upon him to explain every word in every text quoted by him, whether that word required an explanation or not. Take for instance, the words "abiding with her venerable protector" in the very text of Katayana, which we have been considering. These words certainly required an explanation, and we accordingly find the author of the Dayabhaga explaining their meaning to us in the verse next to that in which the text is quoted, that is to say, in verse 57. It would be simply absurd to contend that at the very time when the author was insisting upon the widow's obligation to live under the protection of her husband's male relatives, he was silently releasing her from the main obligation, with reference to which the former is nothing but a means to an end,

namely, the obligation of "keeping unsullied the bed of her lord." It is true that it has been decided by the Privy Council that a widow does not forfeit her rights in her husband's estate merely by reason of her having quitted the protection of his male relatives; but their lordships expressly put their decision upon the ground that the widow in the particular case before them had changed her place of residence from justifiable motives, and not for *unchaste purposes*." This decision is certainly in support of my view; so far as it shows the importance attached by their lordships to the fact that the widow had not left the protection of her husband's relatives for *unchaste purposes*. But at any rate, it is conclusive authority on the point that the widow's obligation to live under the protection of her husband's male relatives is merely auxiliary to the main obligation imposed upon her by the text of Katayana, namely, the obligation of keeping unsullied the bed of her lord.

It has been said that under the Hindu law an estate once vested cannot afterwards be divested. Now there is no work on Hindu law that I am aware of in which it is laid down in so many terms that an estate once vested cannot be divested, nor has the pleader for the appellant been able to point out any. On the contrary, I have already shown in the order of reference that the Hindu law goes to the length of declaring in the most express terms that an unchaste woman forfeits all her rights even in her own *streetdhun*, and this is by far a stronger case of divesting than the one now before us. What then is the source from which the doctrine above referred to has been derived? That source, I venture to affirm, will be found in the simple fact that in the generality of cases the Hindu law makes no provision for the divesting of property once vested; and I am fully prepared to admit that so far as those cases are concerned, the application of the doctrine in question is perfectly legitimate. But to apply it to the present case, without any reference to the nature of the estate under our consideration, or to the conditions which the Hindu law has expressly attached to the enjoyment of that estate, would be to assume the very question which we are called upon to determine.

It has been further said that the widow is not a trustee for the soul of her deceased

husband, and in support of this position we have been referred to a case reported in page 584 of the 9th Weekly Reporter, in which it was held, or rather remarked incidentally, as I shall presently show, that the widow is the absolute mistress of the usufruct of her husband's estate, and that she can dispose of such usufruct in any manner she thinks proper.

Whether the word trustee is applicable to the widow in the strict sense in which that word is used in works on English law is a question which I need not pause to determine. But I think I have conclusively shown in the order of reference that the only right which the widow acquires in her husband's property is the right of using that property for the benefit of his soul, and for *no other purpose whatever*, and such a right, I apprehend, is nothing more than that of a trustee. With reference to the alleged distinction between the usufruct and the corpus of the estate, I have to observe that there is nothing in the Hindu law to support it. It may be that the Courts of Justice in this country, constituted as they are at present, have neither the power nor the inclination to compel a Hindu widow to use her husband's property for his spiritual benefit, but they have no authority, in my opinion, to lay it down as a proposition of Hindu law that she is at liberty to use the income of that property in any manner she thinks proper. According to the Dayabhaga, the highest authority on the point, every "*expenditure*" incurred by the widow out of the estate inherited by her from her deceased husband, which is not conducive to his spiritual benefit, is an act of "*waste*," and the author goes to the length of declaring in the most express terms that she is allowed to maintain herself out of that estate, simply because by preserving her person she confers a benefit upon his departed spirit. In the face of such express provisions, so perfectly general in their terms, what authority have we for drawing any distinction between the corpus and the income of the estate? It has been urged that the texts of Katayana and other Rishis quoted in the Dyabhaga for the purpose of limiting the widow's dominion over the estate inherited by her from her husband apply to the corpus of that estate, but not to the usufruct of it. But if so, from what other text or texts is it that the widow's right to enjoy the usufruct is derived? Then

again, it is an unquestionable proposition of Hindu law that the portion of the usufruct which remains unspent at the time of the widow's death, goes not to her heirs, but to those of her husband. But if we are to hold that the texts in question refer solely and exclusively to the corpus of the estate, where is the authority upon which the above proposition is to rest? The case cited from the 9th Weekly Reporter is not at all in point. The only question raised, and judicially determined in that case, was whether the portion of the usufruct remaining unspent at the time of the widow's death, can be seized in execution of a personal decree against her; and so far as that question is concerned, the decision is certainly in support of my view. It is true that one of the learned Judges by whom that decision was passed, remarked incidentally in his judgment that the widow can, during her lifetime, deal with the usufruct of her husband's estate, in any manner she chooses; but that remark, I submit with the greatest deference, cannot be treated as an authoritative exposition of the law, inasmuch as the point with reference to which it was made was not before the Court on that occasion. Before concluding this portion of my judgment, I wish to quote the following observations made by the Lords of the Judicial Committee in the case of Bhugwan Deen Daby vs. Myna Bibee, reported in page 573, XI Moore:

"The reasons for the restrictions," say their lordships, "which the Hindu law imposes upon the widow's dominion over her inheritance from her husband, whether founded on her natural dependence on others, her duty to lead an ascetic life, or on the impolicy of allowing the wealth of one family to pass to another, are as applicable to personal property invested so as to yield an income as they are to land. *The more ancient texts imposing the restriction are general. It lies on those who assert that moveable property is not subject to the restriction to establish that exception to the generality of the rule.*"

These remarks, it is true, were made by their lordships with reference to the moveable portion of the estate inherited by a widow from her husband. But they are, in my opinion, equally applicable to the usufruct of that estate. The case of Hurree Dass Dutt vs. Sreemutty Uporno Dassee, reported in VI Moore, page 433, is not at

all in point. It is true that the marginal note of that case says, that the title of a widow is not in the nature of trust, but there is nothing whatever in the decision itself to support that position.

Assuming, however, for the sake of argument that the widow is not a trustee for the soul of her deceased husband, I do not see any reason whatever why she should not abide by the condition of chastity which the Hindu law has expressly imposed upon her. That law, as I have already shown, says in the most positive terms that she should enjoy her husband's estate while continuing to keep his bed unsullied, and it does not certainly lie in her mouth to say that the injunction as to chastity ought to be treated as a mere nullity. It has been said that although under the Hindu law as administered in the Bengal school, a sonless widowed daughter is not entitled to inherit her father's estate, a daughter who has once succeeded to such estate does not forfeit it by reason of her afterwards becoming a sonless widow. But this case is by no means parallel to the one now before us. It is true that the chief reason assigned by the writers of the Bengal school for allowing a daughter to inherit her father's property is that she can perpetuate his lineage and *pinda* by giving birth to a son, but that reason has nothing whatever to do with the nature of the estate given to her, nor is it made a condition precedent to her right to enjoy that estate. The daughter's estate, it should be borne in mind, is precisely of the same character as that of the widow, and is governed by the same text of Katayana which has been so often referred to by me. "Or," says the author of the Dayabhaga, "the word wife (in the text of Katayana quoted in verse 56) is of general import, and it must be understood as applicable generally to the case of a woman's succession by inheritance." (See verse 31, Section 2, Chapter XI, Colebrooke's translation of the Dayabhaga.) Whatever therefore may be the reason upon which the daughter's right of succession is founded, it is clear that the estate inherited by her by virtue of that right is subject to this condition only that she should, while keeping her husband's bed unsullied, continue to enjoy it solely and exclusively for the spiritual benefit of her father, and it is therefore beyond all dispute that so long as she is competent to fulfil that condition, no question of for-

foiture can arise. The mere fact of a daughter becoming a sonless widow after the estate has once vested in her, does not and cannot render her incompetent to use that estate for the spiritual welfare of her father; for she can still continue to promote such welfare by leading a chaste life, as well as by doing pious acts for the benefit of his soul; and as there is nothing in the Hindu law which says that she should hold her father's property only so long as she continues to be, or is likely to become, the mother of male children, there seems to be no reason whatever why the argument put forward by the pleader for the appellant should be considered to have any bearing upon the question now under our consideration. On the contrary, the daughter's case affords a striking refutation of the contention that the injunction as to chastity laid down in the text of Katayana is a mere moral injunction not possessing any binding force from a legal point of view. It will be seen that the only portion of the Dayabhaga which is devoted to the discussion of the daughter's right of succession is the second section of the eleventh chapter of that treatise, and if we exclude the 31st verse of that section by which the author extends the operation of Katayana's text to the daughter as well as to other female heirs, there is not a single passage throughout the rest of the section, either in the shape of original text or commentary, in which the slightest reference is made to the subject of chastity. But if, as argued by the pleader for the appellant, the words "keeping unsullied the bed of her lord" in the text of Katayana are to be treated as nugatory or superfluous, there would be nothing to prevent an unchaste daughter from inheriting her father's property, and yet it is the admitted law of the land that such a daughter has no right of succession. The above remarks are also sufficient to show the futility of the argument drawn from the fact that the author of the Dayabhaga has made no comments of his own upon that portion of the text Katayana which contains the words "keeping unsullied the bed of her lord."

The only other authority I wish to refer to is the Vivada Bhūṣaṇ of Jugger Nath Turkopunchanun, a work which is commonly known by the name of Colebrooke's Digest. I have already shown in the order of reference that there are two passages in this work

in which it is expressly laid down that an unchaste widow forfeits all her rights in the estate inherited by her from her husband. It has been said, however, that Jugger Nath Turkopunchanun is no authority on questions of Hindu law; and in support of this position, we have been referred to certain remarks of Mr. Colebrooke, quoted in page 25 of the preface to Baboo Shama Churn's Vyavastha Darpana. I confess I was not a little surprised when I heard this bold assertion. That Jugger Nath Turkopunchanun is one of the most learned pundits whom Bengal has ever produced, and that his opinion on questions of Hindu law is still received with high respect by the millions of Hindus residing in that country, are propositions which do not, in my opinion, admit of any doubt or dispute. His knowledge of the Hindu Shasters is proverbial, and I may add, on the authority of my own personal experience, that even now a Hindu inhabitant of Bengal, who wishes to repudiate the Vyavastha of any particular individual in regard to any point connected with those shasters, may be heard to say, "Why am I bound to follow that man's opinion? He is not a Jugger Nath Turkopunchanun." I yield to no one in my veneration for the great and illustrious name of Mr. Colebrooke, but as the only test for determining whether a particular writer is to be considered as an authority on questions of Hindu law in any particular province of the country is the estimation in which his opinions are held by the Hindu inhabitants of that province, I venture to affirm that, with the exception of the three leading writers of the Bengal school, namely, the author of the Dayabhaga, the author of the Daya Tutwa, and the author of the Daya Crama Sangraha, the authority of Jugger Nath Turkopunchanun is, so far as that school is concerned, higher than that of any other writer on Hindu law, living or dead, not even excluding Mr. Colebrooke himself. Of course, in regard to points with reference to which there is a conflict of opinion between Jugger Nath Turkopunchanun and the three leading writers of the Bengal school mentioned above, the former must give way. But so far as the particular point now before us is concerned, there is not the slightest pretence for saying that any such conflict exists. I do not therefore see any reason whatever why Jugger Nath's opinion on that point is to be treated as a nullity, on the mere ipse

*dict* of the pleader for the appellant. The learned pundits who were consulted in this case did not hesitate for one moment to refer to that opinion as an authoritative exposition of the Hindu law; and as for the remarks of Mr. Colebrooke, I wish to observe that there is nothing in them to justify the contention that Juggur Nath Turkopunchanun is no authority on questions of Hindu law arising in the Bengal school. All that Mr. Colebrooke says is, that the arrangement of the Vivada Bhungarnub is defective, inasmuch as the author has mixed up the discordant opinions maintained by the lawyers of the several schools without distinguishing in an intelligible manner which of them is the received doctrine; but there is a wide gulf between that statement and a statement to the effect that the opinion of Juggur Nath Turkopunchanun is entitled to no weight whatever. I wish to add that the Vivada Bhungarnub of Juggur Nath Turkopunchanun is distinctly mentioned by Sir William Macnaghten as one of the authorities "chiefly consulted" in Bengal (see page 21 of the preface to his work on Hindu law.)

*Glover, J.*—Two questions have been referred to us:—

(1) Does a widow, who has once inherited her husband's estate, forfeit that estate by reason of unchastity? And

(2) If by Hindu law she does forfeit, is the forfeiture barred by Act XXI of 1850?

The matter has been so fully detailed in Mr. Justice Mitter's order of reference, that I do not feel it necessary to go into it at any length, for I concur to a great extent in the opinion expressed by the learned Judges of the second Bench.

I say to a great extent, because I wish to guard myself against being supposed to agree with their estimate of a Hindu widow's estate, or with the restrictions which they would place on her use of property descended to her. No doubt a Hindu widow's estate is one of a peculiar and limited nature, but to the extent it reaches, the widow fully represents it, and she cannot, I think, in accordance with late rulings of the Privy Council, be in any way considered as a trustee for life only. The case of Huree Dass Dutt vs. Upurna Dasse (VI Moore, 433) is authority for this contention.

Nor do I agree with the referring Judges as to the widow's power of using the profits of the estate. There are of course certain

texts of Hindu law, together with glosses by commentators, which say that she is to use them sparingly, and that she herself is to live an ousted and economical life, but the view of the law which has of late years obtained in the Privy Council and in the High Courts of Calcutta and Madras, has been to give her the free use of the profits of the estate so long as she is in a position to use them, and not to describe any item of expenditure so long as it does not affect the *corpus* of the estate as "waste." 3 Madras H. C. Report, 116; Kamadier Venkato Sobhya vs. Joysobana Sujappar; IX Weekly Reporter, 584; Chandraballee Debia vs. Brody.

It is unnecessary to go at length through the various texts of Hindu law which declare the continued subjection of women, and the effect of unchastity in a wife as working exclusion from inheritance. It has been fully admitted in the course of the argument before us that Hindu women are in that position, and that it is a principle of Hindu law to keep them so, and also that no unchaste wife can as a widow take her husband's inheritance. The question is whether having once taken it as a chaste woman, she can be made to forfeit it for subsequent unchastity.

In support of the proposition that she is to retain it, it has been argued that there are no precise texts of Hindoo law which declare forfeiture by an unchaste widow, that unchastity is not to be found amongst the acts which exclude from inheritance, that other heirs who are by circumstances debarred from offering funeral oblations after succession do not forfeit, and that failing direct authority for forfeiture, the rule of Hindoo law is that property once vested cannot be divested.

I do not attach very much importance to the fact that there is no mention of unchastity as a ground of exclusion from inheritance. It seems to me to have been one of the first principles of the Hindoo law relative to women that unchastity was a thing that at once and altogether put them without the pale of all religious observances, and consequently deprived them of all power to fulfil the duties on which inheritance depended, and I should not therefore have expected to find this offence classed with the ordinary disqualifications. It was one about which there was to the Hindoo mind no possibility of doubt, and the Hindoo lawgivers did not apparently think it necessary



to include unchastity amongst the causes of disherison, because it was an offence which admitted of no difference of opinion, and they had already stated in very many texts that the chaste wife only should take, and that the unchaste wife should be excluded. I do not see therefore any difficulty in the omission of unchastity from the chapter of exclusion. Unchaste women, both as wives and widows, undoubtedly *were* excluded, and I can conceive no reason for the omission of their offence on the grounds of exclusion other than the one I have above suggested. Suppose, by way of illustration, that, according to Hindoo law abominably colored individuals, "Albinos," for instance, were from the very fact of their color abominable, and unable to inherit, and that this was a well-known and fixed principle should we expect to find "being of the color of an Albino" amongst the grounds of exclusion from inheritance? would not rather exclusion be taken for granted?

With regard to the absence of texts of law bearing exactly on the case before us, in the first place, I am not prepared to admit that such texts do not exist; but even if they did not, I should feel inclined to follow the rule laid down by the most respected Hindoo commentators, and approved in more than one case by the Judicial Committee of the Privy Council, and instead of isolated texts to apply what I conceive to be the general principles of Hindoo law.

Now a Hindoo widow, according to the practice obtaining in Bengal, takes her husband's property, when there is neither son, grandson, nor great-grandson, under very peculiar circumstances, and burthened with special obligations. She is supposed to represent half of her dead husband's body, and by meritorious acts done in this world to benefit the spirit of her husband in the other. The theory of the Hindoo law of inheritance is the capability by the heir of performing certain religious ceremonies which do good to the soul of the departed, and he takes who can render most service. The sons down to the third generation could do most, offer most oblations, and confer the greatest benefits; therefore they are first in the line of heirship, the widow comes next as being able to confer considerable though less benefit, and it is only because she is able to do this that she is allowed to take her husband's share.

It would seem therefore to be a condition precedent to her taking the estate, that she should be in a position to perform the ceremonies, and offer the continual funeral oblations which are to benefit her deceased husband in the other world, and in this respect her position is very different from that of a son. The son confers benefits upon his father, from the mere fact of being born capable of performing certain ceremonies. His birth delivers his father from the Hell called "Put," and whether in after-life he offer the funeral oblations or no, he succeeds to his father's inheritance from the fact of his being able to offer them. With the widow it is not so; she can only perform ceremonies and offer oblations so long as she continues chaste, and directly she becomes unchaste, from that moment her right to offer the funeral cake ceases. There are many texts of Hindu law to this effect which have been quoted in Mr. Justice Mitter's referring order. I will mention one only as showing more forcibly perhaps than the others that unchastity in a woman makes all offerings of hers worthless "Gifts, fastings, religious, and other good acts of an unchaste woman are vain, their religious merits also, spotless beauty, are fruitless. Those wicked women, who, by the commission of adultery, deceive their husbands, lose from that time the fruits of religious acts, and are doomed to Hell."

This passage, it is argued, refers to women during coverture; but if that be so, the principle enunciated applies equally to widows, namely, that unchastity from the time of its being committed, spoils immediately the effect of religious acts; in other words, prevents a widow from offering funeral oblations to her deceased husband, and so does away with the only reason for which she was allowed to succeed to his property before other and nearer relations. From the moment of her becoming unchaste, she, so far from benefiting, dooms her husband's soul to torment, and the property which was to be expended in funeral oblations and other ceremonies, comforting to the dead man's soul, is useless for either purpose. The widow is in a position to rescue the husband's soul from Hell, and it is because that through the temptations of indigence she might do improper acts, and cause thereby "her husband to fall into a region of

horror," she is vested with means to lead a reputable life.

I do not think it necessary to recapitulate all the texts of Hindu law referred to by Mr. Justice Mitter, but there are two of undoubted authority, which seem to me distinct (so far as any isolated texts can be distinct) as to the necessity of a widow's remaining chaste if she would retain her husband's estate.

The first is from Katayana (quoted in Dayabhaga, Ch. 11, Sec. I, Verse 56). "Let the childless widow preserving unsullied the bed of her lord, and abiding with her venerable protector, enjoy with moderation the property until her death." This, it is contended, means that the widow shall retain the property so long as she lives, provided that when she took it she had not sullied the bed of her lord. This seems to me a very unnatural construction of the passage, which I assume that Mr. Colebrooke, a specially learned Sanskrit scholar, has properly translated.

"Keeping or preserving unsullied the bed of her lord" must surely denote continuance, and refer to the time after the woman took the property originally as a chaste widow. The use of the present form of participle seems to denote this, and when we read the words in connection with the numerous texts which declare that the chaste widow only is entitled to succeed to her husband's estate, and that unchastity renders useless, all the religious ceremonies for performing which the property came to her, it seems difficult to construe the words "keeping unsullied" in any other way than that the widow retains the property only so long as she remains chaste. Besides, if the words "Keeping unsullied" refer only to past time, what is to be made of the other part of the condition, "living with her venerable protector." She cannot live with him until she is a widow, and whilst she so lives with him, she is to keep unsullied, &c., &c.

The second text is, to my mind, still clearer. It comes from Vriddha Menu, an author quoted with approval in the Dayabhaga, and is to the following effect:—"The widow of a childless man keeping unsullied her husband's bed, and persevering in 'religious observances,' shall present his funeral oblation, and obtain his share." Now, the use of the word "*persevering*" is remarkable. The widow, whilst she was a

wife, could perform no religious observances, therefore these must be referred to some time after her husband's death. Supposing that she was chaste, then she might perform ceremonies, and take his share, but she could only persevere in these ceremonies provided she continued chaste, for unchastity would disqualify her from performing them. The word "take" therefore which in the original Sanskrit means "gain, profit," (*labh*) must, I apprehend, be construed as meaning keeping or retaining, for the widow took before she had any time to "persevere" (which is a word denoting continuance), and simply because she was her husband's widow, and qualified by being chaste to succeed to his share. I do not understand how the word persevere refers to any thing less than a continually abiding condition.

And as there is a third text which may also be quoted from Sree Kishen Turkobankar, a great authority in the Bengal school of law, who, referring to the widow, says: "Shadee, chaste, otherwise dominion ceases." It is not easy to apply these words to any other time than one after the widow has become vested with the property.

There are several other texts, some of a later date, others by authors who do not enjoy the same authority as those above recited. They have been quoted at length in the order of reference, and they are so far useful as showing the general consensus of professional opinion amongst Hindu sages and pundits, and which even goes to the length of declaring that the peculiar property of a woman, *i. e.* her *streedhun*, is liable to be forfeited for unchastity. For the forfeiture under similar circumstances of maintenance there are undoubted texts of Hindu law.

I do not forget that a great authority on all matters of Hindu law, Mr. Colebrooke has, in connection with a case arising in the Madras Presidency, given an opinion that a widow once having succeeded to her husband's property cannot be deprived of it unless for loss of caste, unexpiated by penance, and unredeemed by atonement, but no texts are given in support of the proposition; and it is opposed to other authority in the opinion of Mr. Ellis.

Sir W. Macnaghten, who is also an undoubted authority, mentions cases in which, although the word "succession" is used, there is evident reference to a time after the property has become vested in the widow,



and in one case particularly (Volume II, 112 Macnaghten's Hindu law) endorses an opinion that the widow who violates her late husband's bed is degraded, and has no right to her husband's heritage, and cannot even claim maintenance. This was a case in which the property had undoubtedly vested in the widow, for she had given it up to the next heirs on condition of receiving maintenance.

As to the so-called axiom of Hindu law that property once vested cannot be divested, I am not aware of any such inflexible rule, and there have apparently been cases in which it was sought to divest property already inherited, on the ground that the owner was disqualified for some one of the reasons set down in the rules of exclusion. And what, moreover, is the case of a widow who has received from her late husband a power to adopt. So long as she declines to exercise that power, the property remains vested in her. Directly she adopts, it divests from her, and vests in the adopted son; and if that son dies, the property comes back again, and re-vests in the widow, to be again divested if she has the power and inclination to adopt more than once.

Besides the widow's estate is not an absolute one, such as cannot be divested. It is a limited estate for life, and although the widow fully represents it for the time being, she only does so with reference to certain exigencies which the Hindu law allows if she takes it for a special purpose, i. e., the good of her husband's soul, and under special restrictions, one of which is chastity. And if by her own misconduct she places herself in a position which forbids her doing the thing for which the estate was given her, I cannot see why she should retain it, remembering that, according to native ideas, her doing so keeps her late husband in torment.

The question whether unchastity in a widow operates as a forfeiture, has not often come before our Courts; there are, however, some cases in which the point has been decided. The first, *Radha Mones Raur vs. Neel Mones*, was decided by the Full Bench of the Supreme Court in 1792; and it was there laid down that a Hindu widow, by her incontinence, forfeited her right to her husband's estate. It has been contended that the report of this case is very meagre, and that no reasons are given. This may be,

but the decision is couched in perfectly clear and unmistakable language, and one of the Judges who concurred in it, was that very distinguished oriental scholar, Sir William Jones. Any decision on a point of Hindu law in which that learned Judge took part, is entitled to the greatest respect. I do not, moreover, think I am incorrect in saying that at the time this judgment was given, the knowledge of Sanskrit was much more diffused than it is at present, and that the class of pundits was much more respectable and learned.

There are two cases in 1811, notes of which are to be found in Macnaghten's Hindu law, pp. 20, 21, in which the forfeiture of an unchaste widow is declared. The first case is not very clear as to whether the property had been actually vested in the widow, although the words used lead me to believe that such was the case. In the other, it is more distinctly ruled that the widow who did not keep her husband's bed unsullied, had no right to his property, and ought to be expelled from the house. The case in page 112 is still more to the point, and has been already referred to. In all of these cases the word "succession" is no doubt used, but it is clear that the widow had already taken the property, for that, according to Hindu law, cannot be in abeyance but vests in the next heir directly on the death of the owner. Any act of unchastity, therefore, committed by a widow and next heir would be committed after the property had vested in her, and could not be said to prevent her from inheriting, but rather to make her forfeit what had already been inherited.

In *Kashie Nauth Bysack vs. Huro Soon-duree Dossee*, II Morley's Digest, 198. A widow who had ceased to reside in her husband's family for some other cause than unchaste purposes, was declared not to forfeit. This case is not of course directly in point, but it raises a strong presumption as to what the judgment of the Court would have been had the widow gone away for unchaste purposes.

In *Trikranjee Laljee vs. Mr. Laroo* (I. Morley's Digest, 280), it was held that a widow who had married again, i. e., had not kept her first husband's bed unsullied according to Hindu ideas, forfeited her dower money in consequence.

The two cases decided in the S. D. Adawlat in 1843 and 1858, do not help us particularly. In *Ranee Bussunt Koomaree vs. Ranee Kumal Koomaree* and others, the Sudder Court held that an elopement, which I imagine presumed unchastity, was enough to cause forfeiture of the maintenance received from the late husband's family. In the other case, *Rajkoomaree Dassee vs. Golabee Dassee* (S. D. A. Reports for 1858, page 1891,) the unchastity pleaded took place during the lifetime of the husband, and has no reference to the acts of a widow. The case is useful as showing the Sudder Court Judge's opinion as to the bearing of Act XX. of 1851 on such cases, but does not touch the point I am now considering.

Contra, there are the cases of *Sooka Monee vs. Nemaye Churn Dass*, and of *Matunginee vs. Joykali*, the last of which has caused this reference. The case of *Sooka Monee* is not, I think, quite satisfactory, for the decision appears to have turned chiefly on the "absence of any decision of a Court of law showing that such a person" (*viz.*, a widow) "for such a cause as above stated" (*viz.*, unchastity) "might be expelled from possession." Now there *was* a decision on the point, the decision of all the Judges of the Supreme Court in the case of *Radha Monee Raur*, and taking the words of the judgment into consideration, it might very well be that the decision would have been different, had the previous case of 1792 been brought to the Court's notice.

*Matunginee vs. Joykali* is of course exactly in point, and I have considered it with great care and respect. For the reasons above given, however, I am unable to agree with its conclusions.

An argument was made of the unmarried daughter's right of succession, and it was contended that, inasmuch as such a daughter, dying childless, or becoming a widow immediately after she had taken her father's property, was allowed by Hindoo law to retain that property till her death, notwithstanding that she conferred none of the benefits on her father's soul which were expected of her, the widow, although unchaste and similarly unable to confer those benefits, should, by a party of reasoning, be allowed to retain her life estate. I do not see any analogy between the two cases. The daughter is declared by *Manu* to be equal to the son, who is even as the man

himself, and she by oblations duly presented confers great benefits on her deceased father. No doubt she would confer far greater benefits if she perpetuated his race, and bore a son, but she can still present oblations even as a sonless widow, and the next heir could not, for the oblation would cease with the daughter's son. This seems to me a very sufficient reason why the sonless daughter, having succeeded whilst in a position to bear sons, should retain the inheritance for life, and it is surely far different with the widow who has by her own misconduct rendered herself incapable of offering any oblations, or of conferring any of those benefits which formed the sole ground for her taking the estate of her husband. From the moment she becomes unchaste, the widow's religious observances are useless, and her deceased husband falls, as the Hindoo commentator styles it, "into torments."

It has been said that much inconvenience is likely to be caused by declaring unchastity in a widow a cause of forfeiture, and that many conveyances may be voided, and much litigation set at foot. Of this I suppose we must take our chance. My experience tells me that purchasers from Hindoo widows know perfectly well what they are about, and make up for the risks they run by paying very little for what they buy. I have rarely seen a purchase from a widow that was a fair one; and if this class of speculative buyers be put to inconvenience or loss, I do not think it a matter for much regret.

On the whole, and after the best consideration I can give to the subject, I would answer the first question referred by the Division Bench in the affirmative.

The second question does not arise, there being no contention that the widow has been excluded from caste; but if it did, I should be strongly of opinion that Act XXI. of 1850 did not bar the forfeiture. That Act was meant for the relief of those who from conscientious motives, found it necessary to abandon the faith of their ancestors, and not for cases like the present. If a Hindoo widow can become unchaste, and still under cover of this law retain her estate, she makes (setting moral considerations aside) a very good thing of her incontinence. The Hindoo religion forbids her offering oblations, or performing religious ceremonies for her husband, and consequently she has to

expend no part of her property on these observances, but keeps it all for herself. It can hardly be supposed that the Act had this in view, or intended to hold out a premium to immorality.

*Markby, J.*—Having regard to the judgments delivered in the case of *Sreemutty Matunginee vs. Joykali Debee*, and the judgment which is about to be delivered by the Chief Justice, in which I substantially concur, I do not think it necessary to deliver my opinion at very great length.

I consider the question before us to be a general one relating to the succession to property amongst Hindoos, and which, therefore, under section 15 of Regulation IV. of 1793, we are bound to decide to the best of our ability by the Hindoo laws.

By the "Hindoo Laws" I understand the same thing as in section 27 of the Regulation of the 17th April 1780, was described as "the laws of the shaster."

This I take together with the direction of the Privy Council in the case of the Collector of Madura *vs. Mootoo Ramalinga Sutherputty*, 12 Moore's Indian Appeal Cases, page 436, shows that our duty is not so much to enquire whether a disputed doctrine is fairly deducible from the earliest authorities, as to ascertain whether it has been received by the particular school which governs the district with which we have to deal, and has there been sanctioned by usage.

Taking the texts of the Hindoo law as they have been quoted one by one, I think it has been fully shown by the judgments delivered in this and the former case that they do not warrant the proposition that the estate of Hindoo widow is forfeited, *ipso facto*, for unchastity.

But it is still said that, taken as a whole, the Hindoo law does recognize the widow's right to hold her husband's estate only in case she should be chaste, or as it has been put by Mr. Justice Mitter in the judgment which refers this case for our decision, "chastity is a permanent condition attaching to the right itself."

This is a consideration far more difficult than the meaning of particular texts, but it is one which we are no doubt bound to consider,

Upon this point I know of no authority comparable to that of Colebrooke. I know of no authority equal to Colebrooke who has considered this question in the only way

in which it can properly be considered, namely, with a thorough and comprehensive acquaintance with the authoritative treatises on Hindu law, in which the answer of it is to be found. In saying this I intend no disrespect to the opinions of those of my colleagues who express a different opinion. On the contrary, the mere fact that persons so eminently qualified to form an opinion, and so infinitely better acquainted than I am with the modern usages of Hindus, do hold that the widow forfeits her estate, *ipso facto*, by unchastity, would lead me greatly to distrust my own conclusions. But nevertheless, it is acknowledged that the authority for this position is the Hindu law as expounded in the Sankrit commentaries, and upon the Hindu law so taken and so viewed as a whole, I think Colebrooke's opinion is conclusive.

That opinion is stated in Strange, volume II, page 272, in the form of a remark upon a pundit's answer, and with deference I think that opinion was not given in any particular case, nor with reference to the law of any particular school. The particular pundit's answer upon which Colebrooke's remark is made, was given in a case which arose in the Trichinopoly Provincial Court. But the pundit's answers, which are the foundation of Strange's work, are all commented on by Colebrooke with reference to the Hindu law generally, and not with reference either to the particular case in which the pundit was consulted, or to the law of any particular school, unless there happens to be a difference between the schools which is then pointed out. In fact, the pundit's answers are there discussed precisely in the same way as the present question has been now discussed by us.

I would also point out that Mr. Ellis's remark ignores the distinction between a wife and a widow—a distinction which has been frequently pointed out in the course of this case. And, moreover, (as appears from the Preface) it was given on a journey without reference to books, and without having seen Colebrooke's opinion to the contrary.

I therefore simply repeat what I said on a former occasion, that under the Hindu law, after the property has once vested in the widow, she does not forfeit it by a simple act of unchastity, she not having been degraded or expelled from caste.

Upon the construction of Act XXI of 1850, I express no opinion.

*Phear, J.*—I have had the advantage of perusing the draft of the judgment which the Chief Justice is about to deliver, and as I concur substantially in the whole of it, I think it is unnecessary that I should now give at length, in other words, the reasons for my opinion. I desire, however, to say that I quite perceive the great force of the argument, by which my learned brother Mitter has in the Court below supported his view of the law applicable to the case, and the clearness with which he has expounded the ancient texts. Had the matter been *res integra*, and had we been now called upon for the first time to determine, upon the foundation of these texts *alone*, the limitations to which a Hindu widow's enjoyment of property should be subjected, I think it possible that we might arrive at a result very different from anything which has hitherto been recognized by our Courts as the widow's right. At the same time, I also feel very certain that nothing can be conceived much more remote from that which was probably in contemplation of the Hindu law sages than the exceedingly artificial subject which the special respondents now ask us to say is the result of their precepts, namely, an estate of inheritance in the widow subject to defeasance, after vesting upon the occurrence of a contingent event. We have only to look at this principal text of Nareda—"When the husband is dead, his kin are the guardians of his childless widow. In the disposal of the property and care of her person, as well as in her maintenance, they have full power"—in order to become aware how great is the modification and the amount of adaptation to modern requirement which the old Hindu texts must be made to undergo before we can reach through them, even to the proposition of the defendant. The truth is, as it seems to me, that it is now much too late to seek merely the primitive meanings of the venerable authorities, which have been quoted before us, because these have long ago in regard to the very matter now in question received solemn interpretation in the light afforded by the exigencies of modern society. It has been for some time judicially settled by the long series of decisions with which the Chief Justice deals, that according to Hindu law, inclusive of

the texts discussed before us, the widow does at her husband's death, in the absence of a son, grandson, &c. If she be then without disqualification, succeed to her husband's property, and represents it fully as an estate of inheritance; and further that she does not forfeit it, on the subsequent occurrence of disqualification; that in these two particulars she is in the same situation as a male heir. We are now asked to say that so far as the last particular is concerned, the decisions have violated the spirit of the Hindu law, as it may be ascertained in the cited texts, and are therefore wrong. It appears to me that we cannot do this, without at the same time saying that they are wrong in the same particular with regard to males; nay, further, that they are wrong in giving the widow the estate of inheritance at all.

With these views, I am of opinion that the first question ought to be answered in the negative; and if that be so answered, the second question does not arise.

*Jackson, J.*—The question here raised for determination by the Full Bench is not only of some difficulty, but of really vast importance.

From unascertained causes, immoveable property is notoriously in some parts of Bengal to a very large extent in the hands of Hindu widows, whose relations with the families of their deceased husbands are not always amicable, whose personal liberty is now, it may be said, wholly unlimited, and whose enjoyment of the estate not merely defers, but often seriously impairs the prospects of reversioners.

If therefore it be recognized as a rule of law by this tribunal (which constituted as it is to-day concludes and binds every Court of Justice in a Province numbering 42 millions of Hindu inhabitants) that a Hindu widow forfeits by unchastity the estate which she has taken as the heir of her husband, then, I apprehend, not only will a fruitful cause of domestic discord be largely extended, but a motive will be afforded, to say the least of it, for publishing and bringing into Court the most deplorable scandals. That such a ruling will tend in any great degree to purity of life and manners, I do not believe, but it is likely enough to furnish a stimulus to perjury or to collusive proceedings, equally nefarious. This indeed is not a reason for deciding, in one sense or the other, the question we have before us, but it is men-

tioned only for the purpose of showing the gravity of that question.

It is, I think, a matter of regret that so important an issue has been raised in the particular case before the Court, because it does not appear necessarily to arise upon the original contention of the parties, upon the issues framed in, or the decision passed by, the Court of first instance, also because the status of the parties (people of the blacksmith caste in Assam) and the trivial amount of the matter in dispute, have been unfavorable to that full research and discussion which the importance of the abstract question demanded.

The broad question now submitted to us was not so much as touched upon in the judgment of the Moonsiff, who, as it happened, was a native of Assam, and who maintained the widow in enjoyment of the husband's property, on the ground that she had contracted no second marriage, and that consequently the first marriage was still undissolved and valid. If the question had been fairly raised below, it is probable that some evidence would have been produced as to the rules of caste, and the condition of the tribe to which the litigants belong, of which at present we are in utter ignorance. And I confess that this is the circumstance which, in my opinion, takes away much of its value from the evidence given by the pundits who were examined by order of the Division Bench. I was surprised at finding so little allusion to their testimony in the argument before us, and, I take it, these learned persons deposed rather to the law as it is found in the shastras than to observances of the present day, and I do not understand that they pretended to any knowledge of the customs of Assam.

Without any disparagement of the learned and ingenious gentlemen who addressed us on behalf of the respondent (reversioner), it must be admitted that everything which could be said on that side of the case has been set forth in the referring judgment of Mr. Justice Mitter with his accustomed ability, force, and knowledge of the subject; and I also admit that we have derived great assistance from the really able, temperate, and judicious argument of Baboo Mohini Mohun Roy on behalf of the widow, special appellant.

I have had the advantage of reading the judgment which the Chief Justice is about

to deliver, and his opinion so far as it is stated in that judgment has my entire concurrence, that is to say, I consider that the reasoning of the referring Judges is fully answered by that judgment, and that if we were obliged to base our decision of this appeal upon the passages quoted from the ancient Hindu sages and the several digests or systematic books, I should hold for the reasons there given that the widow did not forfeit the estate which has once devolved upon her by reason of subsequent unchastity.

The whole of the passages examined, with one exception, to which I shall presently advert, seem to me applicable to wives and widows, whose known or suspected incontinence debars them from succeeding to the estate of their husbands, and the impression left on my mind from the perusal of those texts and quotations is that the ancient Hindu law was vigilant against the succession of wives who were unworthy to succeed, but did not enjoin or sanction an enquiry in the interests of reversioners, whether or not women, chaste at the time when the succession opened, afterwards maintained a blameless character.

The exception to which I alluded is the second verse of the text of Katyayana, quoted as text C. C. C. L. XXVII., Book V., Chapter IX, Section 1, (Colebrooke's Digest, Volume IV, page 277-8 folio edition, 1798) where it is said "The childless widow, preserving inviolate the bed of her lord, and strictly obedient to her spiritual parents, may frugally enjoy the estate until she die; after her the legal heirs shall take it."

This text does appear at first sight to require chastity as a condition of enjoyment; it also requires obedience to her spiritual parents, but it contains no express authority to deprive her if unchaste or disobedient; on the other hand, it provides that *after her* (without adding *or in case of her failing to comply with the conditions*) the legal heirs shall take it.

It will not be now contended that she could be deprived for an act of contumacy towards her spiritual parents. As far as the text goes, it must, I think, be taken as a whole, and so far as the sanction goes of a law, emanating from authority regarded as divine, if the breach of one clause will not deprive no more will a breach of the other.

To the argument derived from the sanctity of the marriage tie, I will advert presently,

but for the moment we are dealing with the absolute commands of the lawgivers, and not with the considerations on which those commands were probably founded.

In other passages cited, such as that of *Vriddhee Menu*, in text C. C. C. C, VIII, of the same volume, *Colebrooke's Digest*, it is declared that a chaste sonless widow, "who strictly performs the duties of widowhood," shall alone succeed to his whole share.

What those duties are if the widow elects to survive her husband, may be read in *Colebrooke's Book IV., Chapter III, Section 2*, from which it appears, amongst other things, that a widowed woman, sleeping on a bed, would cause her husband "to fall from a region of joy," and it would be monstrous to contend that a widow who took a second repast in the day, who failed to keep her tongue in subjection, or who omitted fasts, pilgrimages, and utterances of the name of Vishnu in the mouth of Bysack, or of Kartick, would, by any of these acts, or omissions, or all of them together, forfeit her estate.

The Hindu Shastras then appear to me to fall short of requiring the forfeiture contended for by the respondent, and the attempt to transmute into a positive rule of law affecting the enjoyment of property that which is to be found there in the way of precept would only involve us in endless absurdities.

But I go further. I cannot conceive that the Courts of this country are bound to enforce, or would be justified in enforcing the principles of the Shastras, merely as such, by way of property law, and I say this quite irrespectively of the British or foreign origin of those Courts, or of the element which our Legislature has introduced into the law of India. I say it too, bearing fully in mind the rule laid down in *Regulation IV of 1793, Section 15*, (which was in force when this suit was before the Lower Courts) to the effect that "in suits regarding succession, inheritance, marriage, and caste, and all religious usages and institutions, the Mahomedan laws with respect to Mahomedans and the Hindu laws with regard to Hindus are to be considered as the general rules by which the Judges are to form their decisions." That rule has now been replaced by *Section 24, Act VI of 1871, the Bengal Civil Courts' Act*.

It was for the purposes of this argument,

I think, tantamount to the declaration contained in *Section 17, 21 Geo. III c. 70*, that in disputes between the native inhabitants of Calcutta, their inheritance and succession to lands, rents, and goods and all matters of contract, and dealing between party and party, shall be determined in the case of Mahomedans by the laws and usages of Mahomedans, and in the case of Gentoos by the laws and usages of Gentoos.

Regard being had to the remote antiquity of the shastras, to their vulgarly accepted sacred origin and immutable character, and to the changes, nevertheless sweeping and progressive, in the constitution and condition of Hindu society during the centuries since *Naredu* and *Menu* wrote, to the fragmentary state, the obscure and too often conflicting tenor of these writings, finally to their inapplicability even at the time of their composition to the whole people, regard, I say, being had to these things, I conceive that we must act upon the shastras in dealing with property and judicable rights, only so far as they are sanctioned and continued by the usage and custom of the people.

This is not merely my own opinion, if it was I should scarcely venture to advance it, but is the opinion of persons whose competence to speak will not be denied. Sir Henry Maine in his *Ancient Law*, page 17, (Ed. 1863) observes: "The Hindu code, called the *Laws of Menu*, which is certainly a Brahmin compilation, undoubtedly enshrines many genuine observances of the Hindu race, but the opinion of the best contemporary Orientalists is that it does not, as a whole, represent a set of rules ever actually administered in Hindustan.

"It is in great part an ideal picture of that which in the view of the Brahmins ought to be the law."

Mr. Steele in the preface to his valuable work on the "*Law and Custom of Hindu Castes*" (new Ed. 1868), quotes from a minute of the Governor of Bombay (no less an authority than the Hon'ble Mount Stuart Elphinstone), dated 22nd July 1823: "The Dharm Shastras, it is understood, is a collection of ancient treatises, neither clear nor consistent in themselves, and now buried under a heap of more modern commentaries, the whole beyond the knowledge, perhaps, of the most learned pundits, and every part wholly unknown to the people who live under it. Its place is supplied in many cases by

known customs, founded indeed in the Dharm Shastra, but modified by the convenience of different castes or communities, and no longer deriving authority from any written text." It was the inquiry into these customs made under the orders of the Government of Bombay that resulted in the publication of Mr. Steele's interesting book, and one cannot help regretting that further efforts have not been made in this direction at Bombay and other places.

It is useful and instructive to observe, in many particulars, the divergence of custom

from the written law,\*  
\* See upon this very question p. p. 35 & 176.

and some such instances are summarized by Mr. Lyon, of the Bombay Civil Service, in a very useful work recently published, called the "Law of India," Volume I, page 13.

Mr. Burnell in his introduction to the translation of part of the Madhaonja Commentary, Daya Vibhaja, page XIII, uses the following language: "The digests, however, were never intended to be actual codes of law, . . . . . There is not a particle of evidence to show that these works were ever even used by the Judges of Ancient India as authoritative guides; they were, it is certain, considered as merely speculative treatises, and bore the same relation to the actual practice of the Courts as in Europe treaties on Jurisprudence do to the law which is actually administered." And so West and Buhler in their Digest of Hindu Law, Introduction, page XXXVI. "It is therefore unreasonable to charge the the Smriti 'codes' with a want of precision and of discrimination between moral and legal maxims, &c., such strictures would only be justified if they were really 'codes' intended from the first to settle the law between man and man."

I would also refer to the observations on a very similar question which arose in the Supreme Court of Bombay in 1847, before Perry, C. J., to be found in 2 Morley, page 431, in the case of the Kojas and Memons of Cutch.

The parties there were Muhammadans, and practice was set up quite at variance with Muhammadan law, and being found to prevail among these people, it was maintained. In that case the plaintiff, sued as a daughter for a share in her father's property. In answer it was set up that, according to the

custom peculiar to the Kojah sect, daughters were excluded from inheritance.

The case was fully argued, and allowed to stand over for judgment. In the meantime another case of the same description arose on the part of some persons of the Memon Cutchee caste, in which it was intimated that exactly the same question was involved, and Sir Erskine Perry, in passing judgment in the case, makes the following observations: After reading the following clause of the charter of the Bombay Court:—"In the case of Muhammadans or Gentoos, their inheritance and succession . . . . shall be determined in the case of the Muhammadans by the laws and usages of the Mahomedans; and where the parties are Gentoos, by the laws and usages of Gentoos, or by such laws and usages as the same would have been determined by if the suit had been brought, and the action commenced in a native Court." He says:—"Now, if the meaning of this clause is that it is an absolute enactment or adoption of the Koran as of a positive unchangeable law, without regard to what the usages of the Muhammadans of India, whether *shias*, or *sunnys*, or sectarians, might have been, undoubtedly the custom set up in the conflict with the text of the Koran cannot be sustained. But I think it is quite clear that the clause in question was framed solely on political views, and without any reference to orthodoxy or the purity of any particular religious belief." In a further passage he says:—"I am clearly therefore of opinion that the effect of the clause in the charter is not to adopt the text of the Koran as law, any further than it has been adopted in the laws and usages of the Muhammadans who came under our sway; and if any class of Muhammadans, Muhammadan dissenters as they may be called, are found to be in possession of any usage which is otherwise valid as a legal custom, and which does not conflict with any express law of the English Government; they are just as much entitled to the protection of this clause as the most orthodox sunny who can come before the Court. Again:—"It should also be further observed that these Muhammadan sectarians have lived chiefly in countries reigned over by Hindu princes, and I can have no doubt whatever on the evidence, and on what we know of the manner in which native Courts dispose of the controversies of their subjects, that if the present su



had been brought before the Rao of Kutch, or any of the Rajput Rajahs of Kuttivar, upon payment of the dues of office, the 25 per cent., or whatever the exaction might be, the decision would have been in conformity to that which is revered by all mankind, but by Hindus, perhaps, more than any other of mankind ancient usage. If this be the true exposition of the rule which would be meted out to these people in their own country, it would be a monstrous thing that an English Court of Justice should be obliged to reverse such a time-honored custom, and almost to revolutionize the internal economy of two whole castes out of some supposed obligatory force in a text called divine, which neither the Judge nor the parties to the suit believe in."

It does not appear that this decision was ever appealed against.

It would be a stupendous effort of legislation to combine into one mass the whole body of Hindu jurisprudence, and to eliminate all that was false or unsuited to the times, to amend that which was defective, supply what was wanting, and re-enact the whole into a great scheme of modern Hindu law; but no such task is likely to be attempted.

Our duty, I take it, is very different. We have only to administer the living Hindu law, and we are not to deprive parties of their property through the operation of rules framed by ourselves in supposed accordance with its abstract principles.

I wish, however, emphatically to say that it is far from my intention to question or to undermine the original authority of the Hindu Shastras. Near 30 years spent in the public service in this country have not taught me to undervalue the great sources of law of usage and of morality, from which millions of Her Majesty's subjects derive their rules of daily conduct. And I know in what eloquent and impressive terms the duty of maintaining those fountains of law has been proclaimed by men of the highest eminence as statesmen and as scholars. But I firmly believe that such declaration has been rightfully and in fact based upon the assumption that the laws so to be protected are not only regarded by the Hindu community with superstitious respect, but also endeared to its members by long and unbroken observance.

A rule of Hindu law on which the Courts

are bound to act, and may act with safety will, therefore, I conceive, be found to originate in the Dhurma Shastras to be extracted and embodied in the great comparatively modern law treatises, such as the Mitacshara, the Daya Bhaga, and others, and to have come down to present times preserved in the usages of Hindu society, and occasionally enforced by the action of the Courts. And many of the rules in most frequent request—those, for instance, of succession, partition, and adoption, will bear this test very well. Cases being of frequent occurrence, the Shastras and the Hindu law books being constantly appealed to, and the Courts having applied themselves with much diligence and some success to the work of interpretation, especially of late when a reasonable instead of a servile or literal mode of construction has begun to be adopted. In the case of *Koer Golab Singh vs. Rao Kureem Singh*, B. L. R., Volume X, page 10, their Lordships in the Judicial Committee says:—"It is entirely opposed to the spirit of the Hindu race to allow the words of the law to control its long received interpretation, as practically exhibited by rules of descent and rules of property founded on the decisions of the Courts of the country, and it seems to their Lordships that it would be extremely mischievous to disturb, upon points taken here for the first time, any such course of decision."

Let this mode of investigation be applied to the present controversy, and let us see the result.

It may, in the first instance, be conceded—1st, that previous known incontinence will exclude a widow from succession; 2ndly, that a widow receiving maintenance loses her right thereto by subsequent profligacy.

The first of these positions was admitted by the appellant's pleader; it is not only clear from the books, ancient and modern, but also it would seem to be supported by practice and by the decisions of the Courts which have been cited. The other rule is also distinctly laid down, is fully recognized, and is in accordance with reason and justice, for a man cannot be bound to feed misconduct in his own family, or to recognize a bond of union which the widow herself has trampled under foot.

Conceding these points, we exclude the authorities which go to support them, and no further, and then what do we find bearing



on the point at issue. An obscurely worded and fragmentary religious precept, no positive enactment of forfeiture, no evidence of custom, unfrequent resort to Courts, and in the only cases where, so far as we can see, the question was really raised and decided, a decision in favour of the widow.

In the most recent case there is the concurrent opinion of the late Chief Justice and of two other Judges of this Court, and this decision the learned Judges who refer this case feel themselves bound to say is "contrary to the Hindu law."

I should not venture to say so, and I do not think so, and of course by the "Hindu law" I mean that Hindu law which we are bound to administer. As to its being contrary to the principle and spirit of Hindu law, I shall say something farther on.

I have just asserted that the Hindu law books contained no positive declaration of forfeiture in such cases. The only thing of this kind suggested was the remark of Sree Kishen Turkalinkar quoted at page 13 of the referring judgment: "*Shadee* (chaste), otherwise the right ceases." This, I think, was well explained by Baboo Mohini Mohun Roy in his reply. Sreekishen does not appear to say anything of the kind in his own treatise, the *Daya Krama Sangraha*, and certainly the phrase "cessation of right" is a different thing from "forfeiture of property."

As to Jugernnath Turkopunchanun, admitting fully his vast and noted erudition, I do not think he would be a safe guide for the Courts, on the strength of his own opinion upon such a matter. He seems indeed to be, like many of the writers on Hindu law, a merely learned person, neither Judge nor lawyer, but pundit and logician, and without their merit of being accurate and precise.

But it has been said that this question cannot be viewed apart from the religious element in the Hindu law; that by the Hindu marriage is regarded as a sacrament, the foundation of the family, and therefore of society; that it was one of the chief aims of the Hindu Legislatures to preserve the purity of the conjugal relation; that with this view restraints were imposed on the weakness of women, forfeiture of property being one of them, and that the removal of these restraints without substituting better ones would be a dangerous innovation.

I have said before that it would not, in

my opinion, be an efficient or proper check upon a weak and thoughtless woman, to put it in the power of her husband's relations to obtain the transfer of her property to themselves on proof of her frailty.

I am not aware that the Hindu system is at all peculiar in its tenderness towards the marriage tie; and if Hindu women differ from others in being weaker and more ignorant, that, it seems to me, is a reason for pity, and not for harshness.

But how does the case really stand? Let those who would enforce in the case of Hindu wives and widows all the duties and all the penalties of the *Shastras*, consider what Hindu marriage was in the days and among the people in which and for whom those books were written, and what it is now.

Those were not the days of child marriages, or of *Koolin* marriages. Professor Wilson says (2nd Volume, *Essays on the Religion of the Hindus*, page 58-9):—"The *Vedas* then did not sanction the marriage of children. In fact, it was impossible for a man to marry before maturity . . . at the earliest he could not have been married before he was seventeen, an early age enough, in our estimation, but absolute manhood as compared with the age of nine or ten, at which Hindu boys are, according to the present practice, husbands. There is no doubt that many other innovations for the worse have been made in the marriage ritual and usages of the Hindus, and the whole system, the premature age at which the parties are married, the practice of polygamy, and the circumstances under which the alliance is commonly contracted, involving the utter degradation of the female sex, is equally fatal to the development of the rural virtues and intellectual energies of the man, and is utterly "destructive both of public advancement and domestic felicity." And although Professor Wilson does not say so, neglect of a wife by her husband in respect of the conjugal relation was not permitted, but was declared to be "punishable according to law," I do not cite the passage, but it may be found in 2nd Volume of *Colebrooke's Digest*.

All this, however, would seem to be thought of no consequence as long as an extreme penalty is reserved for the punishment of an erring woman whose education left her frail and ignorant, and whose married life has made her miserable.

No doubt there will be many cases to the

contrary, and a Hindu wife may be as happy as another. That is true, but those are not the cases in which after-misconduct is most to be apprehended, nor will the Court be at liberty (if it must obey the Shastras, and the Shastras so require,) to choose the instances in which the penalty is to be inflicted.

The child widow must be true to the boy husband, who never reached the age of puberty.

The Koolin's wife must "preserve unsullied the bed of her lord," which perhaps she has never seen, or has shared with co-wives to the number of five or fifty.

To be sure, Koolin husbands are commonly *ex-necessitate* gentlemen, and it might not be worth their relations' while to maintain a watch over the morality of their widows.

It may be argued that a widow who leads an immoral life ought not to be placed in a better position than one who honestly takes the benefit of Act XV of 1856, and in so doing renounces all rights in her deceased husband's property. But the Legislature as to this last provision was simply in accord with native custom, as shown by Steele at page 176 of the book already cited, and it would certainly be a severe shock to native opinion, that a widow by re-marriage should be able to carry away her first husband's property into a strange family, neither his nor her own, and besides, by re-marrying she acquires certain rights or probable rights in the estate of her second husband.

If those who advocate the widow's forfeiture for incontinence do so merely in the interests of morality, it seems to me they would best accomplish this end by inducing the Legislature to punish with fine and imprisonment the *men* who bring shame upon Hindu families, which course would be infinitely juster than visiting it on the widow.

I will only add a few words as to my view of the effect of Act XXI of 1850 on the present question. The Act provides for the cases of those who (1) have renounced, or (2) have been excluded from the communion of any religion, or (3) have been deprived of caste, meaning, I conceive, those who by their own choice or by the action of their caste fellows, have been finally shut out or temporarily deprived, though capable of being restored on the making of proper expiation.

I have already remarked that the extensive changes in public usages, manners, and

feelings have gradually produced, in certain matters, a wide gap between existing facts and the Hindu law, which, like those of the Medes and Persians, changes not, being reputed divine.

It may well have seemed to the Legislature that as many injunctions and many penalties had become obsolete, those which remained in force would be found to be distinctly marked as retaining their force in popular estimation by the simple but effectual brand of outcasting, and that it would not be attempted to enforce any loss of civil rights without first resorting to the tribunal of social opinion, and putting the offender out of caste, and in fact that such loss of caste, and not the misconduct by which it had been occasioned, would be usually insisted upon as working the forfeiture. But we need not consider now whether this speculation is correct or no.

On the grounds I have already stated, as well as those assigned by the Chief Justice, and generally by my brethren, who are of the same opinion, I think that in this case the widow does not incur a forfeiture by reason of her incontinence.

*Kemp, J.*—On the questions referred to this Bench by the second Bench, I concur entirely in the referring judgment, and in that just delivered by Mr. Justice Mitter. I can add nothing to those judgments, but I wish, as Mr. Justice Glover has done, to guard myself from its being supposed that I concur in that portion of the learned Judge's judgment of reference which limits the enjoyment of the widow in the estate of the husband. I do not take the limited view which Mr. Justice Mitter takes of the estate of a Hindu widow, and I concur with Mr. Justice Glover in his remarks as to the extent of that estate, although that was not a question referred to this Bench.

In every other respect, and with due deference to the opinion of the learned Judge in as far as the enjoyment of the estate of her husband by the widow is concerned, in which I cannot concur, I entirely agree with Mr. Justice Mitter.

*Couch, C. J.*—In this suit the following question has been referred to the Full Bench: "Whether, under the Hindu law, as administered in the Bengal school, a widow, who has once inherited the estate of her deceased husband, is liable to forfeit that estate by reason of unchastity." Up to the time

of the reference, there had been no conflict of decisions in this Court, the only case being *Srimati Matangine Debi vs. Srimati Joy Kali*, V Bengal Law Reports, 466, where the decision of Mr. Justice Markby that a widow did not forfeit her right was affirmed by the Chief Justice, Sir Barnes Peacock, and Mr. Justice Macpherson. But the learned Judges, who have referred the question, state that they feel themselves bound to say that that decision is contrary to Hindu law; and we are in effect asked to overrule it. The authorities bearing on the question, and the reasons for an opposite decision, are very fully and elaborately stated by Mr. Justice Mitter in the referring judgment.

I propose, first, to consider that judgment, and will afterwards refer to any authorities or arguments that have been produced which are not in it. It first notices that the authorities in the different schools of Hindu law appear to be unanimous in holding that an act of unchastity is one of the gravest delinquencies of which a woman can be guilty. The texts cited need not be repeated here, and it may be allowed, as the judgment says, that "they are in full unison with the feelings of the Hindu community in general, and that the social status and privileges of Hindu women are still ordinarily determined and regulated by them." They may be, as is also said in the judgment, a valuable guide in the present discussion, but it must be kept in mind that the question is what is the doctrine that has been received by the Bengal school, by the law of which this case is governed, and that has been sanctioned by usages.

It is then remarked that the estate of a widow under the Hindu law is one of a very peculiar character, which is now so fully understood and admitted that I need not refer to the authorities upon it. And then it is said: "Indeed, according to the true theory of the Hindu law she is nothing more than a trustee for her life for the soul of her deceased husband, if we may use the expression." The words "if we may use the expression" show that the learned Judges felt they were speaking figuratively, to which there can be no objection if care is taken to distinguish the figurative from what it resembles, and not in reasoning to substitute the former for the latter. I may here quote the words of Lord Westbury in *Knox vs. Gye*, Law Reports, 5 E. and J. Appeals, 675.

"Another source of error in this matter is the looseness with which the word 'trustee' is frequently used. The surviving partner is often called a 'trustee,' but the term is used inaccurately. . . . It is most necessary to mark this again and again, for there is not a more fruitful source of error in law than the inaccurate use of language. The application to a man who is improperly, and by metaphor only, called a trustee, of all the consequences which would follow if he were a trustee by express declaration, in other words, a complete trustee, holding the property exclusively for the benefit of the *cestui qui trust*, well illustrates the remark made by Lord Mansfield, that nothing in law is so apt to mislead as a metaphor." But, in truth, the word 'trustee' ought not to be used, at least in the sense which is ordinarily attributed to it, and if used in any other, it proves nothing. A widow is not a trustee. She has the usufruct as well as the property in the thing inherited from her husband. Thus Vyasa, as quoted in the judgment, says: "For women the property of their husbands is intended only for use; let them not make waste of it on any account." And the text of Katayana, also quoted, is: "Let the childless widow, keeping unsullied the bed of her lord, and abiding with her venerable protector, enjoy with moderation the property after his death."

It is true that Sir William Macnaghten, in his *Principles of Hindu Law*, 20, speaking of the estate to which a widow succeeds, says; "She can be considered in no other light than as a holder in trust for certain uses: but he goes on to say that, should she make waste, they who have the reversionary interest have clearly a right to restrain her from so doing, not that by making waste she forfeits her estate."

It is then remarked that "it should not be supposed that these provisions were intended by their framers as mere moral precepts, which the widow is at liberty to obey or disobey at her pleasure; on the contrary, the utmost precaution is taken by them to secure their strict enforcement." But as there is no text that if she disobeys she shall lose her property, it may be inferred that it was not intended she should. Texts are then cited to show that, in the disposal of her property and care of her person, a childless widow is subject to the control of her husband's family, and the widow's estate is

compared with that of a male heir under the Hindu law. In both cases the spiritual welfare of the deceased proprietor is the only test resorted to for determining the right of succession; and it is remarked that no effective restriction whatever is put upon the right of enjoyment of the male heir; that the reason for this distinction between male and female heirs is that women are incapacitated from performing the ceremony of Parvuna Shrad, which constitutes, as it were, the very corner-stone of the Hindu law of Inheritance. This applies to all female heirs, and we are asked, in the absence of any positive text, to make a distinction between the widow and other female heirs, and to declare that she is to forfeit her estate if she fails to perform her duties whilst they do not. But it has not been attempted to be shown that there is more reason for the widow to forfeit the estate on account of unchastity, and because her acts are thenceforward inefficacious for the repose of her husband's soul, than for an unmarried daughter to forfeit the estate upon the death of a childless husband, with whom, after her father's death, she may have intermarried, and by whose death childless, she ceases to be efficacious in bestowing benefit on her father's soul.

The widow, chaste at her husband's death, takes as "half her husband's body," and for performing works efficacious for his soul. The daughter, unmarried at her father's death, takes because she is "as it were himself," (Daya Bhaga, chapter 11, section 2, verse 1), and because she is, equally with the son, "a cause of perpetuating the race, and verse 7 confers benefit on her father by means of her son. It is clear from verse 30 that the issueless widowed daughter, in whom, as a spinster, state had vested, would retain it until her death, although, after her husband's death, he would be wholly inefficacious to confer the benefits for which she had been selected to take. If it be said that she may still continue of herself to perform certain acts efficacious for her father's soul, the answer is that those qualities are not the qualifications or conditions for her selection to take the estate. Had she been a childless widow at her father's death, she would have been passed over, notwithstanding the possession of such qualities. The reason for her taking the estate is, not the efficacy of her own acts, but the efficacy of the acts to be

wrought through her son. It is then observed in the judgment that if we were to guide ourselves solely and exclusively by the texts in the Mitakshara and Daya Bhaga, it would have been extremely difficult to come to any satisfactory solution of the question one way or the other. In fact, as is said by the Judicial Committee of the Privy Council of the text in the Mitakshara, they are wholly silent as to the disabilities of the woman, or the nature of the interest which she takes in her husband's estate. If the doctrine contended for has been received, it must have been originated by later commentators. I pass over the remarks upon the Full Bench decisions, but I think it would be very difficult to reconcile it with what we are now asked to declare to be the law. It has been so generally acted upon that we must consider the decision to be the settled law, until the contrary is declared by a higher tribunal. The judgment then says: "Such then being the nature of the estate inherited by a Hindu widow, every act done by her, the effect of which is to incapacitate her from using that estate for the only purpose for which she is entitled to use it, operates as a cause of forfeiture;" and, after citing texts which shew "that an unchaste woman not only causes 'the loss of her husband's soul,' but she is totally incompetent to redeem it afterwards, inasmuch as every act done by her subsequent to the loss of her chastity must be necessarily destitute of all religious efficacy whatever," it says: "As half the body of her deceased husband, she took it as a trustee for the benefit of his soul; but if she is no longer in a position to fulfil her duties as such trustee, the trust property must be taken away from her as a matter of course."

I will consider these two propositions separately. The first assumes that the continuance of the estate in the widow is conditional upon her using it for the intended purpose. Otherwise the incapacity would not cause a forfeiture; for it is not said that the forfeiture is to be considered as a punishment, and no text has been produced to show that it can be regarded in that light. But whether the estate is a conditional one, is the question we have to determine; and it is admitted that the texts under which the widow takes the estate are silent as to her disabilities or the nature of the interest which she takes. In the Mitakshara

chapter 2, section 1, verse 6, the following texts are given: "The widow of a childless man, keeping unsullied her husband's bed, and persevering in religious observances, shall present his funeral oblation, and obtain (his) entire share." Vriddha Manu. "The wealth of him who leaves no male issue goes to his wife; on failure of her it devolves on daughters; if there be none, it belongs to the father; if he be dead, it appertains to the mother." Virbad Vishnu. "Let the widow succeed to her husband's wealth, provided she be chaste; and in default of her, the daughter inherits if unmarried." Katyayana. Chastity is declared to be the condition of her taking the estate; but there is no condition declared as to her keeping it.

The second proposition uses the word 'trustee,' and asserts that if a trustee is not in a position to fulfil his duties, the trust property must be taken from him as a matter of course. If this is intended as a proposition of Hindu law, no authority is cited in support of it, and I am not aware of any. As a doctrine of Courts of Equity in England, it is not correct. The remedies for a breach of trust are stated in a work of high authority, Lewin on Trusts, chapter 27; but the taking away the trust property is not among them; and it has been found necessary to provide for the disability of a trustee by infancy or lunacy by Acts of Parliament. There appears to me to be a fallacy in the proposition. The possession of the trust property is not essential to the performance of the duties. If the widow had sufficient property of her own to maintain herself, she might alienate the whole of her husband's property for her life, and still perform all her duties for the benefit of her husband's soul. In fact, there is no trust attached to the property. It is a personal obligation on the widow, and the proposition really is, that if she does not fulfil it, she shall be deprived of her estate. We must see whether that is a received doctrine in the Bengal school of Hindu law. It is then said that the conclusion that the estate must be taken away from her as a matter of course is not wanting an express authority to support it; and texts are cited which show that it is only a chaste widow who is competent to perform the religious and other acts conducive to the spiritual welfare of her husband. Also a text of Vyasa is cited, which says: "After the death of her husband, let the

virtuous widow observe strictly the duty of continence; and let her daily, after the purification of the bath, present water from the joined palms of her hands to the manes of her husband;" and enumerates other duties. "It is clear," says the judgment, "that, according to the author of the Daya Bhaga, there are two reasons for allowing the widow to succeed to the estate of her deceased husband, namely, first, because she can rescue him from hell by living in the mode prescribed by the Hindu Shastras; and, secondly, because she might cause his soul to fall into a region of torment by doing improper acts through indigence." Let this be granted. The reasons for allowing a person to succeed to an estate are not necessarily the conditions upon which he is to hold it. In the case of the male Hindu heir it is admitted they are not. And the description of the person who is qualified to succeed to an estate has not the force of a condition by which the estate will be defeated if the qualification afterwards ceases, as is before shown in the case of a daughter being an issueless widow. The last text referred to is from Katyayana, cited in the Daya Bhaga. "Let the childless widow, preserving unsullied the bed of her lord, and abiding with her venerable protector, enjoy with moderation the property until her death. After her let the heirs take it." This may, no doubt, be read as making the enjoyment conditional on keeping unsullied the bed of her lord; but it may also be only an injunction to do so, as in the text of Vyasa, "Let the virtuous widow observe strictly the duty of continence;" and the way in which it is used by the author of the Daya Bhaga seems in favour of this. The passage (chapter II, section 1, verse 56) begins: "But the wife must only enjoy the husband's estate after his demise. She is not entitled to make a gift, mortgage, or sale of it. Thus Katyayana says, &c. If Mr. Colebrooke had thought that the words of Vriddha Manu and Katyayana were intended to make the enjoyment of the estate conditional, I think he would have made it clear in his translation that it was so. If the injunction is to have the force of a condition, and the violation of it is to cause a forfeiture of the estate, the Full Bench decision cannot be supported, because the whole estate of the widow would be forfeited by an alienation, and the heirs would take it. I think this text cannot be

considered as a declaration that the enjoyment of the estate is subject to the condition of remaining chaste. The decision of the Privy Council at page 97 of the *Vyavastha Darpana* does not appear to me to give any support to the opposite view. The next friend of the widow, an infant, sued to have the property belonging to her husband. She had removed from the protection of her husband's family, but it was not pretended that she had done so for unchaste purposes. The only question that could be put to the pundits was, whether, by ceasing to reside with the family of her husband, she forfeited her right of succession. They could put their opinions upon no other ground. If their answer implies that the estate would be forfeited by unchastity, they went beyond the question put to them. It is certainly settled by that decision that one part of the injunction in the text is not conditional; and it follows from the form of it that the other part must receive the same construction. This applies also to the text from *Vridha Manu*. Some authorities current in the Bengal school are then cited. Of two of these, *Sree Kishen Turkolunkar* and *Rughoonundun*, I need only say that it does not appear whether they are speaking of the right to inherit, or to keep the property after it has been inherited. A wife's right to inherit on the death of her husband may be said to cease on her becoming unchaste. *Juggonath Turkopunchanun*, the last authority cited, and one of the most modern of the Bengal School, is in favour of the doctrine that the interest of a widow is forfeited by unchastity. Of the texts which are then cited to prove that the Hindu law goes to the length of declaring that a woman who is guilty of unchastity is liable to forfeit even her *stridhan*, or peculiar property, it may be said that if they do not prove that, they do not assist the argument. And if they do, the forfeiture is declared by positive texts, which shows that they were thought to be necessary. Also some of these texts seem rather to refer to acts in the husband's lifetime. As to the remark that as unchaste woman no longer remains half the body of her husband, her estate must necessarily come to an end, I think it may be said that the estate cannot be considered as still the husband's, otherwise a son would not take in preference to the widow. On the husband's death, the estate ceases to be his. The being half the

body of her husband is the reason why the widow is preferred to a daughter.

The objection which does not appear to me to be supported by authority, and has no weight in my opinion, that, according to the Hindu law, an estate once vested cannot afterwards be divested, is met in the judgment by the introduction again of the trust; but here it is said that the estate is *in the nature* of a trust estate,—a change of expression which, I think, indicates some uncertainty in the minds of the learned Judges as to there being a trust attached to the estate. It appears to me that this idea of a trust pervades the whole of the judgment, and I think I have shown, not only that there is no real trust, but that, if there were, forfeiture would not be the consequence of it.

The judgment then discusses the decisions of Courts of Law and the opinions of European writers on Hindu law. The first case mentioned is in the 2nd volume of *Macnaghten* on Hindu law, page 20. It is stated that a person died leaving a widow and a brother of the half blood, and subsequently to his death the widow violated the hitherto unsullied bed of her husband, and had a child by a paramour of another class, while the brother's conduct was consistent with his religion, and the question is put—which of the two is entitled to succeed to the property of the deceased? The answer is: It is the general doctrine that the virtuous widow of a man who dies leaving no heir down to the great grandson succeeds; but that if she, on the death of her lord, be faithless to his bed, she has no right of succession; consequently the widow in such case would be excluded by her husband's half brother. The words "she has no right of succession," must, with reference to the facts stated, be taken to mean that she loses or forfeits the estate, but it is open to the remark that the texts cited do not directly support the opinion. It is the deduction of the pundit from them. The next case is at page 21 of the same volume. In the question it is uncertain whether the widow had become a prostitute, and had violated her husband's bed before or after his death, and the answer is: "If it be proved that the widow, in fact, did not keep her husband's bed unsullied, she has no title to his property, and ought to be expelled from his house." It is doubtful whether this is an authority upon the ques-

tion now before us. The next case is at page 112, where it is stated that the woman became pregnant after the death of her husband, the fruit of an adulterous intercourse. The answer is: "A virtuous widow of a person who leaves no male heir down to the great grandson succeeds her husband, and if she violate his bed, she becomes degraded; consequently, the widow described has no right to her husband's heritage, and cannot claim her maintenance, even though she obtained an agreement for her subsistence previously to her offence." The texts of Vyasa and Katyayana, enjoining that a widow shall remain chaste, are cited as the authorities. It is to be observed that it is said that she becomes degraded, and consequently has no right to her husband's heritage; and it seems to be considered that the loss or forfeiture of the estate is caused by the degradation or loss of caste. Indeed, it is possible that it was assumed in the other cases that there had been loss of caste. In the case in VII. Select Reports, 144, a widow was held to have forfeited her claim to maintenance by eloping with a paramour. There was no question as to the forfeiture of an estate inherited from her husband, for there was an adopted son.

In the case in the Sudder Decisions, 1858, page 1891, the wife had eloped in the lifetime of her husband, and there is no doubt that the right of succession is forfeited by that.

As reported in Montrion's Reports, 814, the case of *Doe ex dem Radha Monee Kaur vs. Nillmonee Dass*, is an express decision by four Judges of the Supreme Court, that a Hindu widow forfeits her right to her husband's estate by incontinence after her husband's death. The report is very brief, and appears to have been taken from the notes of Chambers, C. J. It was decided in 1792, and is mentioned in the note *Doe ex dem Saum Monee Dasse vs. Nemy Churun Dass*, 2 Taylor and Bell, 300, Mr. Montrion's Reports not having then been published. The decision of Sir Lawrence Peel in the latter case seems to be founded on the assumption that the forfeiture was consequent on loss of caste, as he applies Act XXI. of 1850 to it. It seems probable that the opinion of Sir Thomas Strange was then the received doctrine in the Supreme Court. Mr. Colebrooke's opinion in 2 Strange, 272, is, no

doubt, open to the remark made in the referring judgment, that it was given in a case which originated in Trichinopoly; nor does it appear that it was given with any reference to the authorities current in the Bengal school. But the case in 2 Macnaghten, 112, is a Bengal case, and the opinion there agrees with Colebrooke's.

Elberling, 73 and 75, and West and Bühler, 99, are cited as supporting the opinion of the referring Judges. Elberling at page 73 says: "The enjoyment of the property is given her" (the widow) "upon two conditions: 1, that she remains chaste; 2, that she does not make waste;" and at page 75: "A widow is to reside in her husband's family; yet, as 'she forfeits her right to the property only by not remaining chaste, or by making waste, the mere residing with her own family cannot cause a forfeiture of her right to the enjoyment of the property if it be not done for unchaste purposes.' And he cites the text of Katyayana: "Let the childless widow, &c." If Elberling be correct, that the enjoyment of the property is conditional, it must be forfeited as well by the breach of one condition as of the other; and upon an act of waste the estate of the widow would be determined, and the property would pass to the heirs of the husband. This, I believe, has never been held to be the law. In West and Bühler, 99, it is said that a widow, having married herself to another husband by the "Pât" ceremony, had forfeited her right of heirship; but at page 299 the question is put: "A woman of the Dorik caste, having lost her husband, became the mistress of a man of (another) Shudra caste and had a daughter by him: can she claim to be the heir of her husband?" The answer is: "A woman who was chaste at the death of her husband becomes his heir."

The "remark" by the authors upon this is: "According to Strange, El. H. L., adultery divests the right of a widow to inherit after it has vested. On other hand, the Shastri's opinion seems to be supported by the Varantradaya, where it is said (f. 221, p. 2, l. 8) And these persons (those disabled to inherit) receive no share only in case the fault was committed or contracted before the division of the estate. But after division has been made, a resumption of the divided property does not take place, because there is no authority (enjoining such a proceeding)."



And, noticing the opinion of Colebrooke, they say the authorities quoted by him do not support the view that any forfeiture of property necessarily attends expulsion from caste. In the next page, there is an opinion that a widow who remarries cannot be considered a faithful wife. She cannot therefore claim the property of her first husband." It is difficult to reconcile these opinions. Another authority cited in the argument before us for the respondent is Colebrooke's Digest, B. 5, Ch 9, V. 484, which, read with the previous verse, says that a woman who takes delight in being faithless to the bed of her husband is held unworthy of property which has been promised to her by him as her exclusive property, and it was argued that, *a fortiori*, she would be of property inherited from her husband. There is a material difference between the two cases. Allowing that the word translated wife means also widow, the not giving that which has been only promised is different from taking away what the widow had actually succeeded to by virtue of the law of succession, and is in the enjoyment of. Mr. Burnell's translation from the Vyavahara Kanda of the Madhavya, page 31, was cited. The passage appears to refer to the succession of the wife on her husband's death, and not to her subsequent enjoyment. The judgment of the Privy Council in *Kashinath Bysack vs. Hora Soondari Dasi*, Vyavस्था Darpana, 97, was relied upon as showing that the decision in *Montrieu's Reports* was considered as law; but the question of forfeiture by unchastity did not, as I have already remarked, arise in the case; and it was sufficient for the judicial Committee to say that the widow did not forfeit her right of succession by removing from the brothers of her late husband.

In a case in IV Bombay H. C. R., 25, A. C. J., also cited, the Court held that if the inheritance be once vested in the widow, it is not by Hindu law, liable to be divested unless her subsequent incontinence be accompanied by "loss of caste, unexpiated by penance, and unredeemed by atonement," citing 1 *Strange*, H. L., and adopting the words in page 136, and referring to Mr. Sutherland's opinion, Volume II, 269, that the degradation is the cause of exclusion from inheritance. It was argued that as maintenance is forfeited, the estate of the widow should be also. But the text of Naroda is

"Let the brothers allow maintenance to his (deceased's) women for life, provided these preserve unsullied the bed of their lord; but if they believe otherwise, the brethren may resume that allowance," Vyavस्था Darpana, 29. And in Mr. Burnell's work, page 30, a text of Naroda is given, "If any one among brothers dies or renounces worldly affairs (i. e., becomes a religious mendicant), and leaves no issue, the rest may share his property, except the Stridhana, and let them support his wives as long as they live, if they preserve undefiled the bed of their husband; but from others they may resume it (the Stridhana)." Thus we have in this case an express text authorizing the resumption. The absence of any text authorising the heirs of the husband to resume the estate after the widow had succeeded to her deceased husband's property is relied upon as showing that it cannot be divested. And this argument is strengthened by the fact that in another case there is an express text.

Besides, the argument drawn from these texts is founded on an alleged but false analogy between a widow's estate and a widow's maintenance. In the former case, the estate is given to her by express words, and is nowhere expressly taken away, and whilst hers it is independent of other ownership, her enjoyment being only, according to the texts, subject to the advice or control of her male relatives. But maintenance is not so much a right in the estate of another as a duty of that other to be performed towards all those who but for the intermediate existence of himself might be entitled to the estate. "Let them allow a maintenance" assigns a duty to the owner rather than a right to the widow, although such duty may be enforceable by a widow who is without reproach. Moreover, the verses, *Mitakshara*, ch. 2, section 1, verse 37, and *Mayakha*, ch. 4, section 8, v. 2, would seem to show that even the incontinent widow of one who has actually possessed the estate is entitled to maintenance for her life.

It was argued that in the Benares school property inhabited by a woman from her husband is classed among Stridhan, and therefore these texts would apply to it. And that it is the same in the Mithila school. Whether this be so according to the *Mitakshara* is at least doubtful. The contrary has been held by the High Courts both at Madras and Bombay, 2 Madras 291; 2 Bombay



H. C. R., 14; and apparently in the Privy Council also, 11 Moore, I. A., 487. It is certainly not so in the Bengal school, by the law of which we are to be governed in this case. I think I have now noticed all the arguments and authorities produced on the part of the respondents, and most of those for the appellant, the argument for whom was rested mainly upon the absence of any text that the estate of the widow should be divested if she became unchaste. And also upon this that, although by the Hindu law, there are various causes of exclusion from inheritance (Daya Bhaga, Chapter 8) when the estate is once vested, it is not forfeited by the subsequent existence of any of them. In a case in the Sudder Dewany Adawlut Reports for 1854, page 244, it was held that a person who has once succeeded to property is not to be dispossessed of it, if he subsequently becomes insane. It was urged by the respondent's pleader that their being no positive text governing the case, we must look to the principles of the law to guide us in determining it, and that the five texts afforded ample analogy, quoting the words of the Judicial Committee in 9 Moore, I. A., 608. There

the question was how the property descended, and it was absolutely necessary to determine it. Here the estate is by positive text vested in the widow, and there is no necessity to determine that it shall be taken away from her, or to go beyond what has been declared by the texts to be the law. I think we are not at liberty to declare a doctrine, which is not shown to have been received, and sanctioned by usage to be the law, because it may seem to be analogous to a doctrine that has been received. Giving all the effect they deserve to the arguments founded upon the status of woman under the Hindu law and the peculiar character of a widow's estate, I still am of opinion that the estate once inherited is not forfeited, simply by unchastity.

I therefore answer the first question in the negative, and it is unnecessary to answer the second.

*Macpherson, J.*—I concur in the judgment of the Chief Justice.

*Pontifex, J.*—I concur in the judgment of the Chief Justice.

*Ainslie, J.*—I concur.

for life, if *any one* of their member, at the time of committing of burglary, causes death, &c., strongly bears out this view, I am of opinion that an offence, in order to fall within the first of the above alternatives, *i. e.*, in order to be committed *in the prosecution* of the common object, must be immediately connected with that common object by virtue of the nature of the object; for instance, if a body of armed men go out to fight, their common object is to cause bodily injury to their opponents and in that case death, resulting from injury caused, would be homicide, committed in prosecution of the common object.

And an offence will fall within the second alternative, if the members of the assembly for any reason knew beforehand that it was likely to be committed in the prosecution of the common object, though not knit thereto by the nature of the object itself.

It seems, thus, on a little consideration, to be apparent that the two alternatives of section 149 do not cover all possible cases of an offence being committed by one member of an unlawful assembly during the time when the common object of the assembly is being prosecuted. It follows that in every trial of prisoners, on a charge framed under the provisions of section 149 of the Penal Code, even when it is proved that the specified offence was committed by one of the members of the assembly during, so to speak, the pendency of that assembly, it yet remains an issue of fact to be determined on the evidence whether that offence was committed in prosecution of the common object, as I have endeavoured to explain the meaning of those words in the first part of the section; and if not, whether it was an offence such as the members of the assembly knew to be likely to be committed in the prosecution of the object.

Returning now to the particular facts of the present case, I think there appears to be abundant reason for coming to the conclusion that Tareeboolla committed murder in the way described by the Judge. But it seems also clear that murder, or even the taking of life, was not immediately connected with the common object of the unlawful assembly, of which the prisoners were members. That common object was, as the Judge expresses it, to drive Fakir Buksh off the land, and to prevent him from cultivating it. There is, however, nothing in the evidence to indicate that the members of the assembly were pre-

pared, and intended to accomplish that object at all hazards of life. I do not think that they intended to attain the common object by means, if necessary, of murder. Indeed the Judge himself says that the resistance offered by Samed Ali and Sharef Ali was unexpected by the prisoner's party, and that it led to the sudden, and probably at first unintended use of the gun by Tareeboolla. This being so, I find myself unable, sitting as a Judge of fact on this appeal, to arrive at the conclusion that Tareeboolla committed murder in prosecution of the common object of the unlawful assembly, within the meaning of the first part of the section.

Neither do I think it is satisfactorily made out by the evidence that the prisoners knew it to be likely that this offence of murder would be committed in the prosecution of the common object of the assembly within the meaning of the second part of the section, taking that object to be the driving Fakir Buksh off the land. It was, *a priori*, possible, and indeed most probable, that that object would be effected without any risk of life whatever. The assailants had reason to suppose, indeed knew quite well, that the party they were about to attack was absolutely unarmed. The members of the unlawful assembly, generally including the prisoners, might reasonably have expected (and there is nothing whatever in the event to show that they did not) that Fakir Buksh and his co-labourers would be driven off the land by the mere show of such force as they had, or, at any rate, by the use of force very far short of life-taking; and even if I allowed myself to be carried by the evidence, so far as to think (as I do not) that the prisoners and the other members of the unlawful assembly knew that culpable homicide was likely to be committed in the prosecution of the common object, still I should be unable to say that their knowledge also included any of the ingredients of aggravation which are required in order to convert the offence of culpable homicide into the offence of murder. It is obvious that in the events, which happened, those ingredients were of sudden origin, and were entirely personal to the actual murderer. Tareeboolla committed murder by doing, on the spur of the moment, a previously unintended act, which act, however, he must himself be taken to have known at the time, was so imminently dangerous that it must in all probability cause

death or such bodily injury as was likely to cause death, and which did, in fact, cause death. If then the prisoners knew that murder was likely to be committed, in the shape in which it was committed, they must have been aware that it was likely one of the members of the unlawful assembly would do an act which would be likely to cause death, and which would in fact cause death,—a statement which, on the face of it, seems to be a contradiction of terms. In truth, when the second likelihood comes to be placed upon the first, it has the effect, in my judgment, of removing the case altogether from the scope of section 149, and none of those forms of murder from which "likelihood" is absent are brought by the evidence in the case within the contemplation of the prisoners or of anybody else. There is nothing to suggest that the prisoners (or indeed any of them) knew that it was likely that an act would be done by one of the members of the assembly with any of the intents mentioned in the first three clauses of section 300 of the Penal Code, and would cause death.

On the whole, I think that the prisoners have been wrongly convicted of the charge framed under section 149. I think, however, that the facts established against them certainly amount to rioting; and it appears also that they were all armed with heavy *lathes*. Therefore, under the provisions of section 148, they are punishable with imprisonment for a term which may extend to three years.

Accordingly I would reduce the sentence passed by the Sessions Judge to a sentence of rigorous imprisonment for three years.

*Ainslie, J.*—In this case there was a dispute about a piece of land between Fakir Ali and Sahid Ali, which ended in a riot, in the course of which a man, named Tareeboolla, one of the party of the prisoners, fired a gun, and killed Samed Ali. It has been found by the Judge that Tareeboolla was a member of an unlawful assembly, of which the prisoners whose appeal is now before the Court, were also members, and as to Sahid Ali, it is also shown by the evidence that he directly invoked the aid of the party among whom was this Tareeboolla armed with a gun.

Tareeboolla himself is not under trial, but the Judge, in order to apply the provisions of section 149 of the Penal Code to the other prisoners, has considered the nature of the offence committed by Tareeboolla, and has found that it was murder, and in that finding

I think he was clearly right. Under section 149, he has convicted the present appellants of that same offence, and sentence them to transportation for life. If they are rightly convicted under that section, the Court can pass no milder sentence. If that punishment is too severe, it can be reduced by the Local Government; but the only question just now before us is, whether the conviction and sentence are according to law.

Section 149 runs as follows:—"If an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly, or such as the members of that assembly knew to be likely to be committed in prosecution of that object, every person who at the time of committing that offence is a member of the same assembly, is guilty of that offence."

These last words are very stringent. If the section applies, the Court is bound to convict of the particular offence.

Tareeboolla committed the offence of murder. He was at the time of the murder a member of an unlawful assembly. The accused were also members of that unlawful assembly at the time when the murder was committed. Then the questions are: firstly, was the murder committed in prosecution of the common object of the assembly? and, secondly, did the accused know that such an offence was likely to be committed?

As to the first, I find it impossible to say that the murder which occurred was not committed in prosecution of the common object. It seems to me that the common object was not merely to eject the party of Fakir Ali from the disputed field, but that it was to do so by show of force, and if necessary, by actual force. I do not think it possible on the evidence to say that the common object was limited to the ejection, and that the use of force was not deliberately contemplated; nor do I think that we may say that force was only a means to an end, and that the ultimate object of obtaining possession of the field was the only common object of the party. It was clearly the deliberate intention of the unlawful assembly to use certain means to obtain a certain end; and I am, therefore, unable to come to any other conclusion than that the common object was compounded both of the use of the means and the attainment of the end. The evidence distinctly establishes that a number of men proceed to the spot to eject Fakir Ali; that they, or several of

them, were armed with latties; and that one, who was found in the party when the riot commenced, though we do not know when he joined it, was armed with a gun, and that on resistance being offered, they proceeded to use violence; and, judging of their intentions from their actions, I cannot help finding that it was from the first their intention to overpower by force any resistance to the occupation of the field. This violence actually extended to the causing of the death of Samed Ali under circumstances which undoubtedly made the homicide murder on the part of Tareeboolla. On this point, I believe, we are all agreed.

I then come to my second question. Was this murder an offence which the members of the unlawful assembly knew to be likely to be committed in prosecution of their common object, such common object being the use of force, if necessary to obtain possession of the land, I take it that when the law speaks of a man knowing the probable result of his acts, it means that an ordinary man bringing his reason to bear in the matter, must know that such result will probably ensue from his act. If A intentionally, and without lawful excuse, fires a bullet into B's body, he, if not of unsound mind, must know that death is the probable result, though he does not know that death will actually result. B may recover; but if he does not recover, the causing of death is the intentional act of A. It is no excuse for A to say that he had not brought his mind to bear on the consequences of his act; that he had not thought of the matter and therefore did not know at the time of committing the acts what the probable result would be. If the act done is such that a reasonable man who chooses to consider it must know the probable result, the law will presume the exercise of reason and the consequent knowledge.

A number of men armed with clubs go out to enforce a right, or supposed right. By the use of those clubs resistance is offered, and it becomes a question whether they, instead of overpowering their adversaries, are not overpowered themselves. It is likely that, under such circumstances, they will measure their blows? Yet, clearly, they have no right of private defence; and if they cause hurt in any degree, they must take the consequences. It cannot be said that a man who attacks another with a weapon calculated to inflict serious injury, though

without intention of taking life, and finds unexpected resistance, is justified by that resistance in taking life. It may not have been his intention at first to do so, but it comes to be his intention, or at any rate he, under the pressure of the position into which he has forced himself, comes to commit an act so imminently dangerous, that it must in all probability cause such bodily injury as is likely to cause death without any excuse for incurring the risk of causing such injury, and by that act he commits murder. As it is with the individual, so also is it with the members of an unlawful assembly collected with the common object of gaining a certain end of evidence, if it cannot be obtained otherwise. They are bound to assume that the persons they are about to attack will exercise their right of private defence; and, as it seems so me, they must therefore contemplate the probability of the use of very considerable force, and cannot with any show of reason say that the hurt likely to be inflicted is likely to be limited at any precise degree. They possibly do not wish to cause the death of any man, and would be well content to gain their end without striking a blow, by the mere show of force; but for all that, it is their intention to strike, if their end cannot be otherwise gained, and if a very great amount of violence becomes necessary, and is used either to overcome the resistance of the opposite party, or to extricate themselves from the position in which they have placed themselves (their opponents being still within the limits of their right of self-defence), I, for one, cannot but say that the use of that amount of violence, and nothing less, was within their intention. And that being so, I am forced to say that any probable result of that violence was within their knowledge. Homicide is certainly a probable result; and it can hardly be that such homicide, under the circumstances, can be anything less as regards the individuals whose act directly causes death, than murder, and it therefore follows that the probability of the commission of the offence of murder lies within their knowledge.

In this particular case we have one of the party to which the accused belonged, armed with a loaded gun,—a weapon that could not be used as a weapon of offence without imminent risk to life, and therefore, I look upon this case as one in which the probability of the commission of the offence of murder

was more than usually great, and more certainly within the knowledge of the parties. It may be that the accused could have shown circumstances from which the Court ought to infer that the use of that gun was not within their intention or knowledge; but I do not think that the prosecution was bound to prove that no such circumstances existed.

Finding that the murder was committed in the prosecution of the common object of the unlawful assembly, and that it was an offence which the accused knew to be likely to be committed in the prosecution of that object, I am compelled, by the words of section 149, to hold that the accused, as members of the unlawful assembly are guilty of murder. I would therefore, on this appeal, uphold the conviction and sentence, leaving the question of mitigation of punishment to be dealt with separately.

*Pontifer, J.*—In this case the Sessions Judge has found that the act which caused the murder was sudden, and was unpremeditated by any member of the unlawful assembly.

The evidence fully supports such finding. Under these circumstances, I am of opinion that those members of the illegal assembly who did not commit the homicidal act cannot be considered guilty of murder under section 149 of the Penal Code.

To apply that section to the case of murder, its alternative provisions must be read as follows:

"If murder is committed by any member of an unlawful assembly in prosecution of the common object of that assembly, or if murder is committed by any member of an unlawful assembly, and the members of that assembly know murder to be committed in prosecution of that object; every person, who at the time of the committing of the murder, is a member of the same assembly, is guilty of murder."

In the present case the common object of the illegal assembly was to obtain possession of land by a large armed force from a small unarmed party.

In my opinion, the evidence shows that the parties prosecuting that common object did not contemplate, or know it to be likely, that the offence of culpable homicide would be committed.

The murder committed hastily by one member of the assembly was not, in my opinion, committed "in prosecution" of the common object of the assembly, in the planning of which no homicidal intention had been entertained.

Nor could the members of the assembly think, and much less "know," murder to be likely to be committed "in prosecution" of a common object which was intended to be, and which might naturally and probably have been accomplished without homicide.

To bring the offence of murder as defined by the Code within section 149, I think it must either necessarily flow from the prosecution of the common object, or it must so probably flow from the prosecution of the common object, that each member might antecedently expect it to happen.

The offence of murder, as strictly defined by the Code, requires a previous intention or knowledge in the perpetrator; and to "know" that murder is likely to be committed, is to know that some member of the assembly has such previous intention or knowledge. The word "know" used in the second branch of the section is, I think, advisedly used, and cannot be made to bear the sense of "might have known."

This interpretation of section 149, so far as murder is concerned, seems to me confirmed by comparing sections 398, and 396 with sections 148 and 149.

From section 398, it appears that being armed with a deadly weapon at a dacoity, is considered an offence deserving of far greater punishment than the offence under section 148 of being armed with a deadly weapon at a riot.

The reason for this distinction must be that more serious consequences are likely, and must be known to be likely, to result from an armed assembly at a dacoity than at a riot; and yet, if murder is committed by one of five dacoits, the others are not guilty of murder, and may be sentenced to imprisonment for any time under ten years; while, if section 149 is to be construed, as it has been construed by the Sessions Judge in this case, if murder is committed by one of five rioters, the others would all be guilty of murder, and must be sentenced to death or transportation for life, though less serious consequences would antecedently be likely to result than from a dacoity.

I am therefore of opinion that the prisoners who have appealed are not guilty of murder; but as it appears from the evidence that they were members of an illegal assembly, and were all armed with *lathes*, they are guilty of an offence under section 148, and ought, in my opinion, to be sentenced to three years' rigorous imprisonment.

# THE LAW OBSERVER.

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SEPTEMBER 15, 1873.

[No. 9.]

## *Special Appeal No. 1870 of 1870.*

Kerry Kolitanee, (Deft.) *Appellant,*

*versus*

Monyram Kolita, (Plff.) *Respondent.*

THE above case, a report of which will be found in the *Law Observer*, Civil Rulings, p. 143, was argued before a Full Bench consisting of all the Judges of the High Court being ten in number.

It appears that the plaintiff Monyram Kolita sued, as next heir of one Gendela, to recover possession of certain properties which he alleged were held by Kerry Kolitanee, the widow of the said Gendela, she Kerry Kolitanee having forfeited her right to remain in enjoyment of the same by reason of her unchastity. The Moonsiff of Golaghat dismissed the suit, which, however, was on appeal decreed by the Deputy Commissioner of Sebsagur. Kerry appealed specially to the High Court against the decision. The special appeal came on for hearing before Justices Bayley and Mitter who referred it to a Full Bench.

The remarks of Justice Mitter which accompanied the order of reference embodied a full exposition of the Hindu law on the question of a Hindu widow's right to the estate left by her deceased husband.

With reference to the particular circumstances of the case before them, the referring Judges submitted the two following questions for an authoritative ruling by a Full Bench :—

1st.—Whether, under the Hindu law, as administered in the Bengal school, a widow, who has once inherited the estate of her deceased husband, is liable to forfeit that estate by reason of unchastity.

2nd.—Whether the forfeiture, if any, is barred by Act XXI of 1850.

The first question, seven Judges answered in the negative, and the second question, they held, did not arise in the case. Justices Kemp, Glover and Mitter, however, dissented and held, with reference to the first question, that a Hindu widow was liable under the law to forfeit her husband's estate; and with regard to the second, Kemp and Glover J. J. were of opinion that it did not arise in the case.

The texts upon which the Judges, who have decided against the unchaste widow, mainly rest their judgment, are the following :—

“In Scripture and in the code of law, as well as in popular practice, a wife is deemed by the wise as half the body of her husband, equally sharing with him the fruits of pure and impure acts. Of him whose wife is not deceased, half the body survives. How then should another take the property when half his person is alive. Let the wife of a deceased man who left no issue, take his share notwithstanding kinsman, a father, a mother, or uterine brother be present. Dying before her husband, a virtuous wife partakes of his consecrated fire; or, if her husband die before her, she shares

his wealth,—this is primeval law. Having taken his movable and immovable property, the precious and the base metals, the grains, the liquids, and the clothes, let her duly offer his monthly, half-yearly and other funeral repasts. With presents to his manes, and by pious liberty, let her honor the paternal uncle of her husband”—Vrihasputtee. (Dayabhaga c.xi, section 1, v. 2.)

Bridha Menu says :—

“The widow of a childless man, keeping unsullied her husband’s bed and persevering in religious observances, shall present his funeral oblation and obtain his entire share”—(Dayabhaga c.xi, section 1, v. 7.)

Vyasa says :—

“After the death of her husband, let the virtuous widow observe strictly the duty of continence and let her daily, after the purification of the bath, present water, from the joined palms of her hands to the manes of her husband. Let her day by day perform with devotion the worship of the gods, and specially the adoration of Vishnu, practising constant abstemiousness. She should give alms to the chief of the venerable for increase of holiness, and keep the various fasts which are commanded by sacred ordinances. A woman who is assiduous in the performance of duty, conveys her husband, though abiding in another world, and herself to a region of bliss.”—(Dayabhaga c.xi, section 1, v. 43.)

Catayana says :—

“Let the childless widow keeping unsullied the bed of her lord and abiding with her venerable protector enjoy with moderation the property after his death.”

Sreekissen Turkolunkar says :—

“Shadhee, *chaste*, otherwise the right ceases.”

Juggernath Turkapunchanun says :—

“Since a woman has not yet performed the duties of widowhood and the like, how can she have a title to the inheritance immediately after the death of her husband? She has an immediate

title because she is disposed to perform those duties; but afterwards if her propensities happen to change, she forfeits the right she had fully possessed.”—(Colebrooke’s Digest, Vol. 3, p. 479.)

Now, the principal question which the learned Judges of the Full Bench had to determine was, whether a widow, in whom the estate of her deceased husband had vested, could be divested of the same by reason of her subsequent unchastity. It is evident that the first four of the texts cited above do not at all help us to solve the problem. They embody certain moral precepts which a widow ought to follow, but do not authoritatively lay down the law that in case she departed from the course prescribed, she would be liable to forfeit the property which had come into her possession by right of inheritance. Moral obligations being imperfect from their very nature cannot certainly be enforced in a court of law or equity, and hence if a Hindoo widow were frail enough to swerve from the path of duty, there was no human law to compel her to do what was right, or to punish her on account of the thousand and one peccadillos which she might be guilty of under the Hindu Shastras.

The opinion of Sreekissen Turkolunkar is certainly entitled to great weight, but it is impossible to make out, as observed by the Chief Justice, whether “otherwise the right ceases” refers to a widow’s *taking* the inheritance or *keeping* it after she had taken it.

We do not however see much force in the argument that the passage referred to is not to be found in the Daya Crama Sungraha. If its paternity is not disputed, it is quite immaterial whether it is to be found in that work or elsewhere. Certainly the fact of its not being there does not and cannot make it apocryphal.

It was also argued that the phrase “cessation of right” is a different thing from “forfeiture of property.” Abstractedly it may be so; but when a passage has to be construed, it must be construed

according to the context. If the word "Shadhee" referred to the widow, the phrase "otherwise the right ceases" would unmistakably refer to her enjoyment of the property which she had inherited from her husband. The cessation of this right of enjoyment would certainly mean forfeiture of property.

Juggernath's opinion, however, as quoted above, is clear beyond doubt. He lays down in express terms that "if her (the widow's) propensities change, she forfeits the right she had fully possessed." Surely this passage is unequivocal and its meaning too clear to be mistaken. Juggernath, however, as remarked by Justice Jackson, was "a merely learned person, neither judge nor lawyer, but pundit and logician, and without the merit of being accurate and precise." He is, for all that, admittedly a high authority in the Bengal school, but it is doubtful whether his opinion, unsupported by a higher authority, is sufficient of itself to divest a Hindu widow of her right to the enjoyment of her late husband's property by reason of her incontinence.

With reference to the main question involved in the case, namely whether an estate once vested could subsequently be divested, Justice Mitter observes:—

"Now, there is no work on Hindu law that I am aware of in which it is laid down in so many terms that an estate once vested cannot be divested, nor has the pleader for appellant been able to point out any. On the contrary, I have shewn in the order of reference that the Hindu law goes to the length of declaring that an unchaste woman forfeits all her rights even in her own *streedhun*, and this is by far a stronger case of divesting than the one now before us. What, then, is the source from which the doctrine above referred to, has been derived. That source, I venture to affirm, will be found in the simple fact that in the generality of cases, the Hindu law makes no provision for the divesting of property once vested; and I am fully prepared to admit that, so far as these

cases are concerned, the application of the doctrine in question is perfectly legitimate. But to apply it to the present case, without any reference to the nature of the estate under our consideration, or to the conditions which the Hindu law has expressly attached to the enjoyment of that estate, would be to assume the very question which we are called upon to determine."

Now, it is clear Justice Mitter admits that, where the Hindu law has made no provision for "divesting the property once vested," "the application of the doctrine in question is perfectly legitimate." The question then is, whether there is any provision in the Hindu law for divesting the widow of the property which has vested in her. So far as the texts quoted are concerned, with the exception of the opinions of Rughoonundon and Juggernath, there is not one of acknowledged authority which goes to the extent of laying down the rule in express and positive terms. The argument derived from the forfeiture of *streedhun* in cases of incontinence, so far from strengthening the case against the unchaste widow, seems rather to support it. For, if it was necessary to lay down the rule in that particular case, it was also necessary to make a similar provision with reference to property inherited from the husband in similar cases. The absence, therefore, of any such positive rule with respect to the class of cases under notice must be held to be indicative of the unwillingness of the Rishis to visit the frail widow with forfeiture of the property inherited from her husband. It is said that, if *streedhun* is liable to forfeiture by reason of incontinence, *a fortiori* the property in which a Hindu female's right is of a limited character must also be liable to forfeiture for the same reason. But this argument does not advance the case much, for it is only an inference, and it would certainly be most monstrous to deprive a widow of the property which she has inherited from her husband on the basis of such inference.



It is then said that the widow takes the estate of her husband subject to certain conditions, and if by her acts she rendered herself incapable of performing those conditions, her right to enjoy such estate must cease as matter of course. This argument, the Chief Justice answers by a reference to the case of the daughter, who inherits her father's property on account of "the efficacy of the acts to be brought through her son." Now, if this daughter should happen to be barren or mother of daughters only, could she be deprived of her property under the Hindu law on the ground of her inability to perform the conditions under which she originally took the property? The fact is her possession is not interfered with till the termination of her life, although she may be incapable of carrying out the conditions which originally attached to her inheritance. Why then, we ask, should the widow be dispossessed of her husband's property, if she proved incapable of satisfying the conditions under which she inherited the property? Justice Glover would fain distinguish the case of the daughter from that of the widow, and he accordingly says:—"No doubt she (daughter) would confer far greater benefits, if she perpetuated his race and bore a son, but she can still present oblations even as a sonless widow." But his Lordship forgets that it was not upon that condition that she succeeds to her father's property.

Narada says:—

"On failure of male issue the daughter inherits, for she is equally a cause of perpetuating the race."

Now, if the daughter failed to "prolong the father's line" she ought to be deprived of her inheritance, as it was upon that condition that she took it. But under the law she could not be divested of her inheritance, although she was found to be incompetent to fulfil the original condition under which she took it. By a parity of reasoning, then, it must be held that the widow too could not be deprived of her husband's estate, even

if she rendered herself incompetent to perform the necessary ceremonies for the benefit of his soul.

The English authorities on the question seem to be nearly balanced. Mr. Colebrooke's opinion seems to have been that a widow, having succeeded to her husband's estate, could not be divested of it on the ground of unchastity, unless it was attended with loss of caste, "unexpiated by penance and unredeemed by atonement." This opinion, however, was given with reference to a case which arose in Trichinopoly, and it is accordingly said that it cannot therefore be received as an authority in Bengal.

Sir Thomas Strange was of the same opinion.

Sir William Macnaughten, however, held the contrary opinion. Elberling, and West and Buhler seem to take the same view. These latter gentlemen, however, do not rank as high authorities on questions of Hindu law.

Let us now see how far the opinion of the Full Bench under notice is supported by the reported decisions on the subject. The first case is that of *Radhamonee Raur vs. Neelmony Doss*, which was decided by a Full Bench of the late Supreme Court in 1792 and in which it was held by the Judges, among whom was Sir W. Jones, that an unchaste widow forfeited all her rights in the estate of her late husband. There were also two cases decided in 1811, the notes whereof will be found in 2 Macnaughten's Hindoo law, p. p. 20 and 21. It was held in both these cases and in another p. 112 of the same vol., that unchastity operated by way of forfeiture. The first two cases are in point, but in the third it was held that the widow who had been found to be unchaste was not entitled to the maintenance to which she laid her claim on the basis of an agreement which had been made before the offence had been committed. There are, certainly, other cases which were cited in the argument at the bar, and which are referred to by the learned Judges in their judgments, but

as they do not directly bear upon the point in issue, we do not think it necessary to offer any comments upon them.

On the other side we have the case of *Doe d Saummonsee Dassees versus Nemy Churn Dass*, 2 Taylor and Bell, P. 300, which was decided by Sir Lawrence Peel. This was followed by *Matangani versus Joy Kali*, 5 B. L. R., p. 491. In a case reported in IV. Bombay H. C. R., p. 25, it was also held that after an inheritance had once vested in a widow, it was not liable to be divested unless her act of unchastity was attended with loss of caste "unexpiated by penance and unredeemed by atonement."

The conflict is now at an end, and the question has been set at rest by an authoritative ruling by seven Judges of the High Court against three. The Chief Justice has in his judgment fully met the arguments advanced by Justice Mitter in support of his opinion, and it must be conceded that the question mooted has received that thorough and calm investigation at the hands of our learned Judges which its importance demanded.

The judgment delivered by Justice Jackson is really the result of considerable thought and research. He gives the passages cited from the ancient Hindu sages and the several digests in support of Justice Mitter's opinion a full consideration, and thinks that they "fall short of requiring the forfeiture contended for by the respondent." His Lordship takes a broad view of the question, and while admitting that certain questions ought to be determined in the case of Mahomedans by the laws and usages of Mahomedans and in the case of Gentoos by the law and usages of Gentoos, he "cannot conceive that the courts of this country are bound to enforce, or would be justified in enforcing, the principles of the Shastras, merely as such, by way of property law."

His lordship adds—

"Regard being had to the remote antiquity of the Shastras, to their vulgarly accepted sacred origin and immutable character, and to the changes neverthe-

less sweeping and progressive in the constitution and condition of Hindu society during the centuries since Nareda and Menu wrote, to the fragmentary state, the obscure and too often conflicting tenor of these writings, finally to their inapplicability even at the time of their composition to the whole people, regard, I say, being had to these things, I conceive that we must act upon the Shastras in dealing with property and judicable rights only so far as they are sanctioned and continued by the usage and custom of the people."

In this opinion his Lordship is not singular; he is supported by Sir Henry Maine, the Hon'ble Mount Stuart Elphinstone and others who are admittedly regarded as authorities upon the subjects on which they have written. Surely, if at this time of day our courts decided cases in which Hindus were interested, in accordance with the texts generally absurd and often at conflict with one another which were found in the digests and other works, that fact so far from raising their character, would unquestionably compromise it in the estimation of the civilized world. Indeed, such judgments, if any were published, would be found to be most monstrous and wholly incompatible with the spirit of the age.

Certainly, the living usage and custom of the people ought to guide the Courts in the determination of questions like that which has just been decided. We are free to confess that we are not aware of a single instance in which social anathemas have been hurled against a Hindu widow on account of her departure from the path of honor and virtue. Are we to infer that there are no erring widows among the Hindoos?

If Hindoo gentlemen invariably denounced every act of incontinence on the part of widows by sending them to Coventry, depriving them of their civil rights, and otherwise visiting them with social pains and penalties, could it be for a moment believed that the Judges of the High Court, even in the absence of

positive texts declaring the forfeiture for unchastity of their estate, we say, could it be for a moment believed that the Judges of the High Court could have come to any other determination of the question which they have just decided than holding unanimously that unchastity operated by way of forfeiture to deprive Hindoo widows of the estate inherited from their husbands? When the High Court not long ago dismissed Matangani's suit against Joy Kali, we would simply ask whether Hindoo society was thrown into a fit of commotion in consequence of the so called monstrous decision? The case certainly was of considerable importance, the parties were residents of Calcutta and fully known in respectable quarters; and yet strange to say that when it was decided, not one Hindoo gentleman thought it worth his while to move the Hindoo Society in the interests of morality and Hindoo law to enter a solemn protest against the judgement by preferring an appeal at the public expense to Her Majesty in Privy Council. True, some Hindoo gentlemen have just set a subscription on foot for preferring an appeal to the Privy Council against the decision which the High Court have pronounced in the case of Kerry Kolitance, but as we happen to know every thing connected with the affair, we can on no account persuade ourselves to look upon it as "a national movement" indicative of national opinion and feeling. The fact is as observed by Justice Jackson "that the extensive changes in public usages, manners and feelings have gradually produced in certain matters, a wide gap between existing facts and Hindoo law, which like those of the Medes and Persians changes not, being reputed divine."

"It may well have seemed to the Legislature that as many injunctions and many penalties had become obsolete, those which remained in force would be found to be distinctly marked as retaining their force in popular estimation by the simple but effectual brand of outcasting, and that it would not be attempted to en-

force any loss of civil rights, without first resorting to the tribunal of social opinion, and putting the offender out of caste, and in fact such loss of caste, and not the misconduct by which it had been occasioned, would be usually insisted upon as working the forfeiture."

Loss of caste would certainly operate as a forfeiture, but we are not aware of a single instance of a frail widow having been subjected to this penalty unless she left her family dwelling and set up as a woman of the town.

Indeed the idea we now attach to the word "chastity" is wholly different from what was attached to it in the good old days now gone by, when such ladies as Ahalya the wife of Goutama; Dropudy the wife of the Pandovas, Tara the wife of King Bali, Koonty the wife of Pandoo, and the mother of the Pandavas, and Mandadary the wife of Ravana were considered to be the very models of chastity. Models of chastity indeed!!! The fact that wives were "appointed to raise issue" is also fraught with significance.

Justice Jackson does not overlook the consequence which must inevitably have followed if the majority of the judges had come to a determination different from what they have come to, although that is not the ground upon which his Lordship rests his judgement.

Justice Jackson adds: If those who advocate the widow's forfeiture for incontinence do so merely in the interests of morality; it seems to me they would best accomplish this end by inducing the Legislature to punish with fine and imprisonment the *men* who bring shame upon Hindoo families, which course would be infinitely juster than visiting it on the widow."

Here we must beg to propose an amendment. We would recommend the Legislature to make a provision also for punishing the *widows*, however much the idea might ill accord with European nations on the subject; for we are painfully aware of the fact that in the case of widows with properties they are invariably the *tempters*.

# ACTS

OF THE

## COUNCIL OF THE GOVERNOR-GENERAL OF INDIA.

(Received the assent of His Excellency the Governor-General on the 7th January, 1873.)

### ACT No. I OF 1873.

#### The Burma Courts' Act Amendment Act.

An Act to amend the Burma Courts' Act, 1872.

WHEREAS it is expedient to amend the Burma Courts' Act, 1872, It is hereby enacted as

follows —

1. This Act may be called "The Burma Courts' Act Amendment Act".

It extends only to the territories under the administration of the Chief Commissioner of British Burma:

Sections eleven, twelve and thirteen shall come into force at the expiration of two months after the passing of this Act. The rest of this Act shall come into force at once.

2. Save as otherwise provided by the Burma Courts' Act, 1872, and by this Act, the Code of Civil Procedure shall be, and shall, on and from the fifth day of April 1872, be deemed to have been in force throughout British Burma.

3. Notwithstanding anything contained in the Code of Civil Procedure, section six, every Deputy Commissioner may direct suits to be instituted in the Courts subordinate to him, according to such rules as to the description of the suits and the amount or value of their subject-matter as he shall from time to time, with the sanction of the Judicial Commissioner, prescribe in this behalf,

and may also, with the like sanction, direct the business of the said Courts to be distributed among them in such way as he thinks fit:

provided that no Court shall try any suit where the amount or value of the subject-matter exceeds its proper jurisdiction.

4. Notwithstanding anything contained in the Code of Civil Procedure, sections twenty-six and one hundred and seventy-two, plaints may be written and evidence may be taken down in such language or languages as the Chief Commissioner shall from time to time direct in this behalf.

5. Notwithstanding anything contained in the said Burma Courts' Act, 1872, and subject to any express provision to the contrary contained in any other Act for the time being in force, an appeal shall lie from the decrees and orders of the Courts of original jurisdiction in British Burma to the Courts empowered by the said Act, section eight and section sixty-nine, respectively, to hear appeals from decrees and orders.

All such appeals presented between the fifth day of April 1872 and the passing of this Act, shall be deemed to have been presented under this section.

6. In the interval between the presentation of an appeal, under section sixty-nine of the said Burma Courts' Act, 1872, and the hearing thereof by the Special Court, the appeal and all applications relating thereto shall be dealt with by the Judicial Commissioner as if it were an appeal presented in his own Court.

7. For the purposes of the Court Fees Act, 1870, the said Special Court shall be deemed to be a High Court in the exercise of its jurisdiction as a Court of Appeal or as a Court of Reference, as the case may be.

For the purposes of the Indian Limitation Act, 1871, appeals and applications to the said Special Court shall be deemed to be, respectively, appeals and applications to a High Court under the Code of Civil Procedure, or under the Code of Criminal Procedure, as the case may be.

8. When the civil appellate jurisdiction of any Commissioner has,

Application of Act VII of 1870 and IX of 1871 to certain petitions to Judicial Commissioner

under section twenty-nine of the Burma Courts' Act, 1872, been transferred to the Judicial Commissioner,

(a.) all petitions and other documents presented to the Judicial Commissioner in the exercise of the jurisdiction so transferred shall, for the purposes of the Court Fees' Act, 1870, be deemed to have been presented to the Commissioner :

(b.) and all appeals and applications presented to the Judicial Commissioner in the exercise of the jurisdiction so transferred shall, for the purposes of the Indian Limitation Act, 1871, be deemed to have been presented to him in the exercise of his ordinary jurisdiction.

9. In any case in which a Court of first appeal has, in the opinion of the Judicial Commissioner, wrongly refused to submit a statement under section thirty-five of the Burma Courts' Act, 1872,

the Judicial Commissioner may call for the record of the case,

and may, on receipt of such record, proceed to try the case as if it were an appeal instituted in his own Court.

And in any case in which a Court of first appeal has submitted such a statement, but, in the opinion of the Judicial Commissioner, the statement is unduly limited, or justice cannot be done without re-hearing the case,

the Judicial Commissioner may proceed to try the case as if it were an appeal instituted in his own Court.

The Judicial Commissioner shall send the Court of first appeal a copy of his judgment in any case tried under this section, and the said Court shall dispose of the case in conformity with such judgment.

10. To section thirty-five of the said Act, the following words shall be added : "and a certified copy of such reasons shall, on application to the Court, be furnished to any party to the suit."

Amendment of Act VII of 1872, sec. 35

11. No person shall be permitted to appear, plead or act as the advocate of any suitor, or of any appellant, complainant or accused person, in the Court of the Judicial Commissioner, or in any Court, whether civil or criminal, subordinate thereto, unless such person is licensed thereto by the Judicial Commissioner, either generally or specially.

Licensing of Advocates.

The Judicial Commissioner may from time to time make rules for the qualification, admission and enrolment of proper persons to appear, plead or act as aforesaid ;

Rules for their qualification and admission.

and for the suspension or dismissal of any such persons who are guilty of fraudulent or grossly improper conduct.

All such rules shall be published in the local official Gazette.

Any person appearing, pleading or acting in contravention of any such rule, shall be liable, by order of the Court, to a fine not exceeding five hundred rupees.

12. Notwithstanding any thing contained in section eleven or in any rule made thereunder,

Saving of agents of Government, suitors, co-suitors, and advocates of High Courts.

any person may appear, plead or act as the agent for the Crown or for the Secretary of State for India in Council,

and any suitor may appear, plead or act on behalf of himself or a co-sutor :

and any person who for the time being is an advocate, vakil or attorney-at-law of any High Court may appear, plead or act as the advocate of any suitor in the Court of the Judicial Commissioner or any Court subordinate thereto.

And nothing contained in section eleven or in any rule made thereunder shall be deemed to affect the second clause of section 186 of the Code of Criminal Procedure.

13. The fees to be received by any advocate, for business done in the Court of the Judicial Commissioner or in any Court subordinate thereto, shall at all times be subject to the control and taxation of the presiding Judge ; and no such fees shall be recoverable unless they have been allowed on taxation by the said Judge, or such officer as he appoints in this behalf.

Fees liable to taxation.

The Judicial Commissioner may from time to time make rules regulating the control and taxation of costs in such subordinate Courts.

14. No trial had by the Commissioner or Deputy Commissioner at <sup>Saving of certain trials at Maulmain, Rangoon and Akyab.</sup> Courts of Session in the towns of Maulmain, Rangoon and Akyab, shall be deemed to have been invalid merely on the ground that such trial was not by jury.

WHITLEY STOKES,

*Secy. to the Govt. of India.*

(Received the assent of His Excellency the Governor General on the 21st January, 1873.)

## ACT No. II OF 1873.

### THE BURMA FERRIES' ACT, 1873.

#### *An Act for regulating Ferries in British Burma.*

WHEREAS it is expedient to regulate the public ferries within the Province of British Burma: Preamble.  
it is hereby enacted as follows:—

#### *I.—Preliminary.*

Short title. 1. This Act may be called "The Burma Ferries' Act, 1873."

Local extent. It extends only to the territories under the administration of the Chief Commissioner of British Burma;

Commencement. And it shall come into force on the passing thereof.

#### *II.—Public Ferries.*

Power to declare and establish public ferries. 2. The Chief Commissioner may declare what ferries within any part of British Burma shall be deemed public ferries, and the district in which, for the purposes of this Act, they shall be deemed to be situate, and may at any time hereafter establish new ferries, where, in his opinion, they are needed, and may, from time to time, change the course of any public ferry,

or discontinue any public ferry which he deems unnecessary.

Every such declaration, establishment, change or discontinuance shall be made by notification in the local official Gazette.

3. The immediate superintendence of all public ferries shall, except as hereinafter provided, be vested in the Deputy Commissioner of the district in which they are situate,

and he shall make all necessary arrangements for the supply of boats for such ferries, and for the collection of the authorized tolls leviable thereat.

4. The Chief Commissioner may direct that any public ferry situated within the limits of a Municipality; town may be managed by the officer or public body charged with the superintendence of the municipal arrangements of such town,

and may further direct that all or any part of the proceeds from such ferry shall be paid into the Municipal Fund of such town,

and thereupon such ferry shall be managed, and such proceeds or part thereof shall be paid, accordingly.

5. The tolls of any public ferry may be put up to public auction for such term not exceeding three years as may be deemed expedient by the Commissioner of the Division in which such ferry is situate, and may be let to the highest bidder.

The lessee shall conform to the rules made under this Act for the management and control of such ferry,

and may be called upon by the officer putting the tolls of the ferry up to auction to give such security for his good conduct and for the punctual payment of the rent as such officer may deem fit.

Such officer may, for sufficient reason duly recorded in writing, refuse to accept the offer of the highest bidder, and may accept any other bid, or may withdraw the tolls from auction.

6. Subject to the revision and confirmation of the Chief Commissioner, the Commissioner of each Division shall have power to make rules consistent with this Act—

for the control and the management of all public ferries within his division ;

for regulating the time and manner in which, and the terms on which, the tolls of such ferries may be let by auction ;

for collecting the rents payable for the tolls of such ferries ;

and for fixing the limits of the same :

and, when the tolls of a ferry have been let under section five, he shall have power (subject as aforesaid) to make additional rules—

for regulating the number and kinds of boats and their dimensions, and the number of crew for each boat, which the lessee of the tolls will be required to keep ;

the hours during which he shall be bound to ply,

and the number of passengers, carts, carriages and animals, and the quantity of goods, that may be carried in each kind of boat at one trip ;

and for the keeping of such boats continually in good condition for the safe conveyance of passengers and property.

The lessee shall make such returns of traffic as the Commissioner may from time to time require.

7. No person shall, except with the sanction of the officer charged with the management of a public ferry, keep a ferry-boat for the purpose of plying for hire within the limits of such public ferry.

Nothing hereinbefore contained shall prevent persons plying between two places, one of which is without and one within the said limits, or apply to boats which the Chief Commissioner expressly exempts from the operation of this section.

### III.—Tolls.

8. Tolls, according to such rates as are from time to time fixed by the Chief Commissioner, shall be levied on all persons, animals and other things carried by means of any public ferry :

Provided that the Chief Commissioner may, from time to time, declare what persons, animals or other things shall, when employed or transmitted on the public service, or for other sufficient reason, be exempt from payment of such tolls.

Where the tolls of a ferry have been let under section five, any such declaration,

if made after the date of the auction, shall entitle the lessee to such abatement of the rent payable in respect of the tolls as may be fixed by the Commissioner of the Division with the concurrence of the Chief Commissioner.

9. The lessee or other person authorized

to collect the tolls of any public ferry, shall affix a table of such tolls, legibly written or printed in the vernacular language, in some conspicuous place near the ferry,

and shall be bound to produce, on demand, a list of the tolls, signed by the Deputy Commissioner or such other officer as he appoints on this behalf.

10. All tolls or rents received under this Act shall, except in the cases provided for by section four, be credited to the district fund.

### IV.—Penalties.

11. Every lessee or other person authorized to collect the tolls of a public ferry, who neglects to affix and keep in good order and repair the table of tolls mentioned in section nine,

or who wilfully removes, alters or defaces such table, or allows it to become illegible, or who fails to produce, on demand, the list of the tolls mentioned in section nine, shall be liable to fine not exceeding twenty rupees.

12. Every such lessee or other person as aforesaid asking or taking other than the lawful toll,

or without due cause delaying any person, animal or other thing, shall be liable to a penalty not exceeding fifty rupees.

13. In the event of any breach by a lessee of the tolls of a ferry, of the rules for the management of such ferry made under section six,

the Deputy Commissioner may impose upon him a fine not exceeding twenty rupees,

and in that event, or in the event of repeated liability to the penalties respectively provided by sections eleven and twelve,

Private ferry not to ply within certain distance of public ferry without sanction.

Penalty for failing to affix, or for removing, &c., table of tolls.

Penalty for taking unauthorized toll.

and for causing delay.

Cancellation of lease on breach of rules.

the Deputy Commissioner may also, with the sanction of the Commissioner of the Division, cancel the lease of the tolls of such ferry and make other arrangements for its management during the whole or any part of the term for which the tolls were let.

14. Every person crossing at any public ferry who refuses to pay the proper toll,

or who, with intent of avoiding payment thereof, fraudulently or forcibly crosses any ferry station without paying the toll,

or who obstructs any toll-collector or lessee of the tolls of a public ferry, or any of his assistants, in any way in the execution of their duty under this Act,

shall be liable to fine not exceeding fifty rupees over and above the value of the damage, if any, which he has done.

15. Whoever conveys for hire any passenger, animal, cart, carriage or other vehicle, or any goods or merchandise, to or from any point within the limits assigned to each public ferry, in contravention of the provisions hereinbefore contained, shall be liable to fine not exceeding fifty rupees.

Where the tolls of such ferry have been let under the provisions hereinbefore contained, the whole or any portion of any penalty realised under this section or section fourteen may, at the discretion of the convicting Magistrate or Bench of Magistrates, be paid to the lessee.

16. All offences against this Act shall be heard and determined by any Magistrate or Bench of Magistrates; and any Magistrate or Bench of Magistrates having summary jurisdiction under chapter XVIII of the Code of Criminal Procedure, shall try such offences in manner provided by that chapter.

Every Magistrate or Bench of Magistrates trying offences under this section may enquire into and assess the value of the damage (if any) done by the offender to the ferry concerned, and shall order the amount of such value to be paid by him in addition to any fine imposed upon him under this Act; and

the amount so ordered to be paid shall be leviable as if it were a fine.

WHITLEY STOKES,

Secy. to the Govt. of India.

(Received the assent of His Excellency the Governor General on the 21st January, 1873.

## ACT No. III of 1873.

### THE MADRAS CIVIL COURTS' ACT, 1873.

*An Act to consolidate and amend the law relating to the Civil Courts of the Madras Presidency subordinate to the High Court.*

WHEREAS it is expedient to consolidate and amend the law relating to the Civil Courts of the Madras Presidency subordinate to the High Court; It is hereby enacted as follows:—

#### PART I.

##### PRELIMINARY.

1. This Act may be called "The Madras Civil Courts' Act, 1873":

It extends to all the territories for the time being under the Government of the Governor of Fort St. George in Council, except the Tracts respectively under the jurisdiction of the Agents for Ganjam and Vizagapatam;

And it shall come into force on the first day of March 1873.

2. On and from that day the enactments mentioned in the schedule hereto annexed shall be repealed to the extent specified in the third column of such schedule.

#### PART II.

##### ESTABLISHMENT AND CONSTITUTION OF CIVIL COURTS.

3. The number of District (heretofore designated Zilla) Courts to be established or continued under this Act, shall be fixed, and may from time to time be altered, by the Local Government:



Provided that no increase to the number of such Courts shall be made by such Government without the previous sanction of the Governor-General in Council.

4. The number of Subordinate Judges and District Munsifs to be appointed under this Act for each District, shall be fixed, and may from time to time be altered, by the Local Government :

Provided that no addition to the number of such officers shall be made by such Government without the previous sanction of the Governor-General in Council.

5. The place at which any Court under this Act shall be held may be fixed, and may from time to time be altered,

in the case of a District Court or a Subordinate Judge's Court, by the Local Government,

in the case of a District Munsif's Court, by the High Court.

6. Whenever the office of the Judge of a District Court (hereinafter called a 'District Judge') or of a Subordinate Judge under this Act is vacant,

or whenever the Governor General in Council has sanctioned an addition to the number of District Judges or Subordinate Judges under the provisions of section three or section four,

the Local Government shall appoint to the office such duly qualified person as it thinks proper.

7. Whenever the office of a District Munsif under this Act is vacant,

or whenever the Governor General in Council has sanctioned an addition to the number of District Munsifs under the provisions of section four,

the High Court shall appoint to the office such person as it thinks fit :

Provided that he possesses the qualifications for the time being required by the rules in this behalf which the High Court, with the previous sanction of the Local Government are hereby empowered to make and alter.

Every appointment made under this section shall be published in the same manner as appointments made by the Local Government.

The Local Government may, for good and sufficient reason, annul any appointment made under this section.

8. The present Zila Courts, Principal Sadur Amins, and District Munsifs, shall be respectively the first "District Courts," "Subordinate Judges," and "District Munsifs" under this Act

9. Every Court under this Act shall use a seal of such form and dimensions as are, for the time being, prescribed by the Local Government.

### PART III.

#### JURISDICTION.

10. The Local Government shall fix, and may from time to time vary, the local limits of the jurisdiction of any District Judge or Subordinate Judge under this Act :

Provided that, where more than one Subordinate Judge appointed to any district, the District Judge may assign to each such Subordinate Judge the local limits of his particular jurisdiction within such district.

The present local limits of the jurisdiction of every Civil Court (other than the High Court) shall be deemed to have been fixed under this Act.

11. The High Court shall fix, and may from time to time modify, the local jurisdiction of District Munsifs.

12. The jurisdiction of a District Judge or a Subordinate Judge extends, subject to the rules contained in the Code of Civil Procedure, to all original suits and proceedings of a civil nature.

The jurisdiction of a District Munsif extends to all like suits and proceedings, not otherwise exempted from his cognizance, of which the amount or value of the subject-matter does not exceed two thousand five hundred rupees.

13. Regular or special appeals, or appeals under Madras Regulation XI of 1832, section nine, shall, when such appeals are allowed by law, lie from the decrees and orders of a District Court to the High Court.

Appeals from decrees of District Courts.

Appeals from the decrees and orders of Subordinate Judges and District Munsifs shall, when such appeals are allowed by law, lie to the District Court, except when the amount or value of the subject-matter of the suit exceeds rupees five thousand, in which case the appeal shall lie to the High Court:

Provided that, whenever a Subordinate Judge's Court is established in any District at a place remote from the station of the District Court, the High Court may, with the previous sanction of the Local Government, direct that appeals from the decrees or orders of District Munsifs within the local limits of the jurisdiction of such Subordinate Judge be preferred in the Court of the latter:

Provided also, that the District Judge may remove to his own Court, from time to time, appeals so preferred, and dispose of them himself, or may, subject to the orders of the High Court, refer any appeals from the decrees and orders of District Munsifs, preferred in the District Court, to any Subordinate Judge within the District.

14. When the subject-matter of any suit or proceeding is land, a house or a garden, its value shall, for the purposes of the jurisdiction conferred by this Act, be fixed in manner provided by the Court Fees Act, 1870, section seven, clause V.

Valuation of suits for immovable property.

15. Every Court under this Act may require a witness or party to any suit or other proceeding pending in such Court to make such oath or affirmation as is prescribed by the law for the time being in force.

Power to require witness or party to make oath or affirmation.

16. Where, in any suit or proceeding, it is necessary for any Court under this Act to decide any question regarding succession,

Law administered by Courts to Natives.

inheritance, marriage or caste, or any religious usage or institution,

(a) the Muhammadan law in cases where the parties are Muhammadans, and the Hindu law in cases where the parties are Hindus, or

(b) any custom (if such there be) having the force of law and governing the parties or property concerned,

shall form the rule of decision, unless such law or custom has, by legislative enactment, been altered or abolished.

(c) In cases where no specific rule exists the Court shall act according to justice, equity and good conscience.

17. No District Judge, Subordinate Judge or District Munsif, shall try any suit to or in which he is a party or personally interested, or shall adjudicate upon any proceeding connected with, or arising out of, such suit.

Judges not to try suits in which they are interested;

No District Judge or Subordinate Judge shall try any appeal against a decree or order passed by himself in another capacity.

Nor to try appeals from decrees passed by them in other capacities.

When any such suit, proceeding, or appeal comes before any such officer, he shall report the circumstances to the Court to which he is immediately subordinate.

Mode of disposing of such suits and appeals.

The superior Court shall thereupon dispose of the case in the manner prescribed by the Code of Civil Procedure, section six.

Nothing in the last preceding clause of this section shall be deemed to affect the extraordinary original civil jurisdiction of the High Court.

## PART IV.

### MISCONDUCT OF JUDGES.

18. Any District Judge, Subordinate Judge, or District Munsif may, for any misconduct, be suspended or removed by the Local Government.

Suspension of Judge by Local Government.

19. The High Court may, whenever it sees urgent necessity for so doing, suspend a Subordinate Judge pending the orders of the Local Government.

Suspension of Subordinate Judge by High Court.

The High Court shall immediately report the circumstances of such suspension, and the Local Government shall make such order thereon as it thinks fit.

20. The High Court may suspend any District Munsif who is alleged to have misconducted himself, or may appoint a commission for enquiring into his alleged misconduct.

The provisions of Act No. XXXVII of 1850 (for regulating enquiries into the behaviour of public servants) shall apply to enquiries under this section, the powers conferred by that Act on the Government being exercised by the High Court.

On receiving the report of the result of any such enquiry, the High Court may, if it think fit, remove the Munsif from office, or suspend him, or reduce him to a lower grade.

21. The District Judge may suspend from office, whenever he sees urgent necessity for so doing, any District Munsif under his control.

Whenever a District Judge exercises the power conferred by this section, he shall forthwith send to the High Court a full report of the circumstances of the case, together with the evidence, if any, and the High Court shall make such order thereon as it thinks fit.

## PART V.

### MINISTERIAL OFFICERS.

22. The Ministerial Officers of the District Court shall be appointed, and may be suspended or removed by the Judges of such Courts, whose orders in such matters shall be final.

23. The Ministerial Officers of the Courts of the Subordinate Judges and District Munsifs shall be appointed, and may be suspended or removed from office, by such Subordinate Judges and District Munsifs respectively, subject to the approval or confirmation of the District

Judge within whose jurisdiction such Courts are situate.

24. Every appointment under this Part shall be made subject to such Rules regulating such appointments, rules as the Local Government from time to time prescribes on this behalf.

Every person appointed under this Part shall perform such duties as may from time to time be imposed upon him by the presiding officer of the Court to which he belongs.

The present Ministerial Officers of the Courts under this Act shall be deemed to have been appointed under this Part.

## PART VI.

### MISCELLANEOUS.

25. In the event of the death of the District Judge,

or of his being incapacitated by illness or otherwise for the performance of his duties, or of his absence from the station in which his Court is held,

the senior Subordinate Judge of the District shall, without interruption to his ordinary duties, assume charge of the District Judge's office, and shall discharge such of the current duties thereof as are connected with the filing of suits and appeals, the execution of processes and the like,

and shall continue in charge of the office until the same is resumed or assumed by an officer duly appointed thereto.

26. The District Judge, on the occurrence within his district of any vacancy in the office of District Munsif, may, pending the orders of the High Court thereon, appoint such person as he thinks fit to act in such office,

and he shall at once report to the High Court the occurrence of every such vacancy and such appointment.

27. Subject to the other provisions of this Act and to the rules for the time being in force and prescribed by the High Court in this behalf, the general control

over all the Civil Courts under this Act in any District is vested in the District Judge.

28. The Local Government may, by notification in the official Gazette, invest, within such local limits as it shall from time to time appoint,

Investiture of Subordinate Judge with Small Cause jurisdiction.

any Subordinate Judge with the jurisdiction of a Judge of a Court of Small Causes for the trial of suits cognizable by such Courts up to the amount of rupees five hundred,

Investiture of District Munsif with similar jurisdiction.

and any District Munsif with the same jurisdiction up to the amount of rupees fifty, and may, by like notification, whenever it thinks fit, withdraw such jurisdiction from the Subordinate Judge or Munsif so invested.

29. Section fifty-one of Act No. XI of 1865 shall be read as if, for the words "Principal Sudder Ameen," the words "Subordinate Judge" were substituted.

Power to invest Small Cause Court Judge with powers of Subordinate Judge.

Sections one, eight, nine, ten and twelve of

Amendment of Madras Act No. I of 1868 Madras Act No. I of 1868. (for the appointment of a Commissioner for the administration of civil and criminal justice and for the superintendence and collection of the revenues on the Neilgherry Hills) shall be read as if, for the words 'Civil' and 'Zillah,' used therein with reference to a Civil or Zillah Judge or Court, the word 'District' was substituted, and as if, for the words "Principal Sudder Ameen," the words 'Subordinate Judge' were substituted.

But save as provided in this section nothing herein contained shall be deemed to affect the said Madras Act.

30. The High Court may permit the Civil Courts under its control to adjourn from time to time for periods not exceeding in the aggregate two months in each year.

Vacation.

## SCHEDULE

REFERRED TO IN SECTION 2.

### I.—Madras Regulations.

Number and year of Regulation.	Title of Regulation.	Extent of Repeal.
Regulation II of 1802.	A Regulation for establishing and defining the Jurisdiction of the Courts of Adawlut, or Courts of Judicature, for the Trial of Civil Suits in the first instance, in the British Territories immediately subject to the Presidency of Fort St. George.	so much as has not been repealed.
Regulation III of 1802.	A Regulation for receiving, trying and deciding suits or complaints declared cognizable in the Courts of Adawlut established in the several zillahs immediately subject to the Presidency of Fort St. George.	The unrepealed part of section seven. The unrepealed part of the first clause of section sixteen.
Regulation XII of 1802.	A Regulation for the appointment of the Ministerial Officers of the Civil and Criminal Courts of Judicature.	so much as has not been repealed.
Regulation III of 1816.	A Regulation for rescinding Regulation VI of 1806, and for authorizing the Courts of Sudder and Foujdarry Adawlut to sanction the occasional Adjournment of the Civil and Criminal Courts under the Presidency of Fort St. George.	so much as has not been repealed.

Number and year of Regulation.	Title of Regulation.	Extent of Repeal.
Regulation VI of 1816 ...	A Regulation for reducing into one Regulation the Rules which have been passed regarding the Office of Native Commissioners; for modifying and extending their Powers in the Trial and Decision of Civil Suits; and for authorizing them, under the designation of District Moonsifs, to discharge certain additional Duties.	So much as has not been repealed.
Regulation VII of 1816 ....	A Regulation for authorizing District Moonsifs to assemble District Panchayets for the Adjudication of Civil Suits for Real and Personal Property, without limitation as to Amount or Value, within their respective jurisdictions; and for defining the Powers and Authority to be vested in such District Panchayets.	The whole.
Regulation II of 1821 ...	A Regulation for extending the Jurisdiction of the Registers, Sudder Ameens, and District Moonsifs, and for the more effectual checking of Abuses by District Moonsifs.	So much as has not been repealed.
Regulation VII of 1827 ...	A Regulation for constituting the Office of Native Judge.	The whole.
Regulation II of 1823 ...	A Regulation for improving the Administration of Justice by District Moonsifs, in certain respects.	So much as has not been repealed.
Regulation I of 1829 ...	A Regulation for amending the Rules in force relative to the Trial of Appeals, and for the better securing of Impartiality in the Administration of Justice.	So much as has not been repealed.
Regulation III of 1833 ...	A Regulation for conferring upon Sudder Ameens jurisdiction in Criminal Cases, and for extending the Civil Jurisdiction of Registers, Sudder Ameens, and District Moonsifs.	So much as has not been repealed.

## II.—Acts.

Number and year of Act.	Title of Act.	Extent of Repeal.
Act No. VII of 1843 ...	An Act for abolishing the Provincial Courts of Appeal and Circuit in the Presidency of Fort St. George, and for establishing new Zillah Courts to perform their functions ; for establishing Courts constituted according to Regulations I and II and Regulations VII and VIII of 1827, in place of the existing Civil and Criminal Zillah Courts, and for extending the Civil jurisdiction of such Courts.	The whole Act, except sections twenty-six, forty-four and forty-seven.
Act No. IX of 1844 ...	An Act for authorizing the institution of Suits in the Courts of Principal Sudder Ameen and Sudder Ameen.	So much as has not been repealed.
Madras Act No. IV of 1863	An Act for investing certain Courts in the Presidency of Fort St. George, either wholly or in part, with the jurisdiction exercised by Courts of Small Causes established under Act XLII of 1860.	The whole.
Madras Act No. I of 1865...	An Act to provide for the alteration of the stations of Zillah Courts and limits of Districts, or Zillahs in the Madras Presidency.	The whole Act, except so much of section one as empowers the Governor in Council of Fort St. George to alter the limits of existing districts.

WHITLEY STOKES,

*Secy. to the Govt of India.*

( Received the assent of His Excellency the Governor General on the 21st January, 1873.)

## ACT NO. IV OF 1873.

## THE PANJÁB MUNICIPAL ACT, 1873.

*An Act to provide for the appointment of Municipal Committees in the Panjáb, and for other purposes.*

WHEREAS it is expedient to provide for the appointment of Municipal Committees in towns in the Panjáb, and for police, conservancy, local improvements, and education in such towns, and for the levying of rates and taxes therein ; It is hereby enacted as follows :—

Preamble.

## I.—Preliminary.

1. This Act may be called "The Panjáb Municipal Act, 1873."

Short title.

It extends only to the territories under the government of the Lieutenant Governor of the Pan-

Local extent.

And it shall come into force on the passing thereof.

Commencement.

2. Act No. XV of 1867 ( to make better provision for the appointment of Municipal Committees in the Panjáb, and for other purposes ) and Act No. II of 1872 ( to revive and continue the operation of Act XV of 1867 ) are repealed ; and Act No. XXVI of 1850 ( to enable im-

Repeal of Acts.

provements to be made in towns), is repealed so far as it affects the Panjáb.

But all extensions and appointments made, and all limits defined, under the said Act No. XV of 1867, shall be deemed to be, respectively, made and defined under this Act. And an extension of any particular provision of Act No. XV of 1867 shall be deemed to be an extension of the corresponding provision of this Act.

And all assessments, bye-laws, rules and regulations of any kind, relating to matters provided for by this Act, which may heretofore have been made or approved by the Local Government, shall be deemed to have been made under this Act.

And all proceedings taken under any such assessments, bye-laws, rules and regulations shall be deemed to be as valid as if they had been taken under this Act.

3. In this Act "Committee" means a Municipal Committee under this Act.

4. The Local Government may, by notification published in the *Panjáb Gazette*, declare its intention to extend this Act, or any of its provisions, to any town in the said territories.

Any inhabitant of such town objecting to such extension may, within six weeks from the said publication, send his objection in writing to the Secretary to the Local Government, and the Local Government shall take such objection into consideration.

When six weeks from the said publication have expired, the Local Government, if no such objections have been sent as aforesaid, or (where such objections have been so sent in) if, in its opinion, they are insufficient, may, by like notification, effect the proposed extension.

5. For the purposes of this Act, the Local Government may, from time to time, by notification in the *Panjáb Gazette*, declare what shall be deemed to be a town for the purposes of this Act, and define the

limits of any town to which this Act has been extended.

## II.—Appointment, Duties and Powers of Committees.

6. In every town to which this Act is extended, the Local Government shall appoint, or cause to be appointed, a Committee consisting of not less than five members.

Such members may be appointed as the Local Government from time to time directs, either *ex-officio*, or by nomination, or by election, or some by one and some by any other of such methods :

Provided that (except with the approval of the Governor General in Council) not less than two-fifths of the members of a Committee shall be persons other than salaried officers of Government.

The Local Government may—

(a) from time to time remove any of the members of any Committee, add to their number, and fill up vacancies occurring among them ;

(b) determine the time and manner of the election of those members whom it may direct to be appointed by election, and the persons by whom they shall be elected, and generally make such rules as it thinks fit for regulating such election ;

(c) appoint the President and Vice-President, or either of them, of any Committee, or authorise any Committee to appoint, by election from their number, such President, or Vice-President, or both.

No appointment under this section, other than the appointment by election of a Vice-President, shall be valid unless and until it is notified in the *Panjáb Gazette*.

7. Subject to any general rules or special orders which the Governor General in Council may from time to time make in this behalf,

every Committee intending to impose taxes for the purposes of this Act shall, from time to time, give public notice of such intention, and shall in such notice define the persons or property within the town to be taxed for the purposes of this Act, and the amount or rate of the taxes to be imposed hereunder.

Any inhabitant of such town objecting to such notice may, within a fortnight from the date of the said notice, send his objection in writing to the President of the Committee, and the Committee shall take such objection into consideration and report their opinion thereon to the Local Government.

When a fortnight from the date of the said notice has expired, if no such objections have been sent as aforesaid, or (where such objections have been sent in) if, in the opinion of the Committee, they are insufficient, the Committee may, with the previous sanction of the Local Government, to be notified in the *Panjab Gazette*, define the persons or property and the amount or rate of the taxes aforesaid, and may then impose such taxes accordingly.

Power to make rules for collection and application of rates.

8. The Local Government may from time to time make rules—

as to the persons by whom, and the manner in which, any assessment of taxes under this Act shall be confirmed,

and for the collection of such taxes ;

and for the safety and due application of them when collected ;

and for the reudering and publishing of such estimates and accounts relating to the expenditure of the Municipal Funds, in such form as it may think fit.

No tax shall be collected under this Act, until the assessment thereof has been confirmed by the persons and in manner for the time being prescribed by such rules.

9. Rates and arrears of rates imposed under this Act may be recovered as if they were arrears of land-revenue.

10. All sums received by the Committee of any town to which this Act extends, and all fines levied under this Act, shall constitute a fund, which shall be called the Municipal Fund of such town, and shall, together with all property which may become vested in such Committee, be under their control, and shall be applied by them as trustees for the purposes of this Act.

11. Every Committee, so far as the Municipal Fund at their disposal permits, shall, after providing out of such Fund for a police establishment in manner hereinafter mentioned,

Duties and powers of Committees.

keep the public streets, roads, drains, tanks and water-courses of the town for which they are appointed clean and repaired ; and, generally, may do all acts and things necessary for the construction, repair and maintenance of local public works of general utility ;

and may also make provision, by the establishment of new schools or the aiding of already existing schools or otherwise, for the promotion of education ;

and may also make provision for promoting the public health, safety, comfort and convenience.

12. Every Committee shall set apart out of the Municipal Fund such sum as the Local Government from time to time requires for the maintenance of the police establishment in the town for which the Committee is appointed.

Provision for police.

13. Every Committee may make rules for regulating—

Power to make rules as to business and officers.

the time and place of their meeting ;  
the conduct of their business ;  
the division of duties among the members of the Committee ;

the duties, salaries, appointment, suspension and removal of the officers and servants of the Committee ;

and other similar matters.

14. Any Committee may make bye-laws—

Power to make bye-laws.

(a) for defining, prohibiting and abating nuisances, which are not public or common nuisances under the Indian Penal Code, or under Act No. V of 1861 (*for the regulation of Police*) ;

(b) for defining the cases, manner and times in and at which the officers of the Committee may enter upon private property for the detection and abatement of nuisances ;

(c) for securing a proper registration of births and deaths ;



(d) and for carrying out all or any of the purposes of this Act.

The Committee may, from time to time, repeal, alter or add to any bye-laws made under this section.

15. No bye-law, and no alteration or repeal of or addition to a bye-law, shall have effect until it has been confirmed by the Local Government.

All bye-laws, made under this Act, and all rules made under section thirteen, and all alterations and repeals of and additions to such bye-laws and rules shall, before coming into force, be published for such length of time, and in such manner, as the Local Government from time to time directs.

16. The officers of the Committee shall have power to enter upon private property for the detection and abatement of nuisances when the Committee shall, under section fourteen, clause (b), have made bye-laws regulating the exercise of such power.

17. The Local Government may, by order, suspend or limit all or any of the powers of any Committee, and may also cancel any of their proceedings, rules or bye-laws, and remit or reduce any tax which they have imposed.

### III.—Suits by and against Committees.

18. Every Committee shall sue and be sued in the name of their President.

Every contract made on behalf of any Committee in respect of any sum or property exceeding twenty rupees in amount or value, shall be in writing, and shall be signed by the President or Vice-President (if any) and at least two other members of the Committee.

No contract, unless so executed, shall be binding on the Committee on whose behalf it is made.

No member of a Committee shall be personally liable for any contract made or expense incurred by or on behalf of the Committee; but the funds from time to time in the hands of the Committee shall be liable for, and chargeable with, contracts duly made as aforesaid.

Every member of a Committee shall be liable for any misapplication of money entrusted to the Committee, to which he has been a party, or which happens through, or is facilitated by, his neglect of his duty;

and he shall be liable to be sued for the same in such Court as the Local Government directs as for money due to the Secretary of State for India in Council.

19. No suit shall be brought against a Committee or any of their officers, or any person acting under their direction, for anything done, or purporting to be done, under this Act, until the expiration of one month next after notice in writing has been delivered or left at the office of the Committee, or at the place of abode of such person, stating the cause of suit and the name and place of abode of the intended plaintiff.

Unless such notice be proved, the Court shall find for the defendant.

Every such suit shall be commenced within three months next after the accrual of the right to sue, and not afterwards.

And if any person to whom any such notice of suit is given shall, before suit brought, tender sufficient amends to the plaintiff, such plaintiff shall not recover.

### IV.—Penalties.

20. No member or servant of a Committee shall be interested, directly or indirectly, in any contract made with the Committee, and if any such person be so interested, he shall thereby become incapable of continuing in office or in employment as such member or servant, and shall be liable to a fine of five hundred rupees:

Provided that no person, by being a shareholder in, or member of, any incorporated or registered Company, shall be disqualified from acting as a member or servant of a Committee by reason of any contract entered into between such Company and the Committee.

Nevertheless it shall not be lawful for such shareholder or member to act as a member of the Committee in any matter relating to any contract entered into between the Committee and such Company.

21. Whoever infringes any bye-law made and confirmed as directed in this Act, shall be liable to a fine not exceeding fifty rupees, and, in the case of a continuing infringement, to a fine not exceeding five rupees for every day after notice from the Committee of such infringement.

In default of payment of any fine imposed under this section, the defaulter shall be liable to simple imprisonment for a term not exceeding eight days.

22. Prosecutions under this Act for infringements of bye-laws may be instituted before any Magistrate by the Committee, or by any person authorized by the Committee in this behalf.

23. Fines imposed under this Act may be recovered in manner provided by the Code of Criminal Procedure.

WHITLEY STOKES.

*Secy. to the Govt. of India.*

(Received the assent of His Excellency the Governor-General on the 28th January 1873.)

## ACT No. V OF 1873.

### THE GOVERNMENT SAVINGS' BANKS ACT, 1873.

*An Act to amend the law relating to Government Savings' Banks.*

WHEREAS it is expedient to amend the Law relating to the payment of deposits in Government Savings' Banks; It is hereby enacted as follows:—

#### *Preliminary.*

1. This Act may be called "The Government Savings' Banks Act, 1873."

It extends to the whole of British India.

And it shall come into force on the passing thereof.

2. Act No. XXVI of 1855 (*to facilitate the payment of small deposits in Government Savings' Banks to the representatives of deceased depositors*) is hereby repealed.

Interpretation-clause.

"Depositor" means a person by whom,

"Depositor."

"Deposit."

and "deposit" means money so deposited:

"Secretary" includes every person empowered to manage a Government Savings' Bank;

and "Minor" means a person who has not completed the age of eighteen years.

*Deposits belonging to the Estates of deceased Persons.*

4. If a depositor dies, leaving in a Government Savings' Bank a sum of money not exceeding one thousand rupees,

and if probate of his will or letters of administration of his estate, or a certificate granted under Act No. XXVII of 1860 (*for facilitating the collection of debts on successions, and for the security of parties paying debts to the representatives of deceased persons*), is not produced to the Secretary of such bank within three months of the death of the said depositor,

the Secretary of such Bank may pay the said sum of money to any person appearing to him to be entitled to receive it, or to administer the estate of the deceased.

5. Such payment shall be a full discharge from all further liability in respect of the money so paid:

But nothing herein contained precludes any executor or administrator, or other representative of the deceased, from recovering from the person receiving the same the amount remaining in his hands after deducting the amount of all debts or other demands lawfully paid or discharged by him in due course of administration.

And any creditor or claimant against the estate of the deceased may recover his debt or claim out of the money paid under this Act, or the said Act No. XXVI of 1855, to any person, and remaining in his hands unadministered, in the same manner and to the same extent as if the latter had obtained letters of administration of the estate of the deceased.

6. The Secretary of any such Bank may take such security as he thinks necessary from any person to whom he pays any money under section four for the due administration of the money so paid, and he may assign the said security to any person interested in such administration.

7. For the purpose of ascertaining the right of the person claiming to be entitled as aforesaid, the Secretary of any such Bank may take evidence on oath or affirmation according to the law for the time being relating to oaths and affirmations.

Any person who, upon such oath or affirmations, makes any statement which is false, and which he either knows or believes to be false or does not believe to be true, shall be deemed guilty of an offence under section one hundred and ninety-three of the Indian Penal Code.

8. Where the amount of the deposit belonging to the estate of a deceased depositor does not exceed one thousand rupees, such amount shall be excluded in computing the fee chargeable, under the 'Court Fees' Act, 1870, on the probate, or letters of administration, or certificate (if any), granted in respect of his property :

Provided that the person claiming such probate or letters or certificate shall exhibit to the Court authorized to grant the same a certificate of the amount of the deposit in any Government Savings' Bank belonging to the estate of the deceased. Such certificate shall be signed by the Secretary of such Bank, and the Court shall receive it as evidence of the said amount.

9. Nothing hereinbefore contained applies to money belonging to the estate of any European officer, non-commissioned officer, or soldier dying in Her Majesty's service in India, or of any European who, at the time of his death, was a deserter from the said service.

#### *Deposits belonging to Minors.*

10. Any deposit made by, or on behalf of any minor, may be paid to him personally, if he made the deposit, or to his guardian for his use if the deposit was made by

any person other than the minor, together with the interest accrued thereon.

The receipt of any minor or guardian, for money paid to him under this section, shall be a sufficient discharge therefor.

11. All payments of deposits heretofore made to minors or their like payments heretofore made, of a Government Savings' Bank shall be deemed to have been made in accordance with law.

#### *Deposits belonging to Lunatics.*

12. If any depositor belonging to comes insane or otherwise incapable of managing his affairs,

and if such insanity or incapacity is proved to the satisfaction of the Secretary of the Bank in which his deposit may be, such Secretary may, from time to time, make payments out of the deposit to any proper person, and the receipt of such person, for money paid under this section, shall be a sufficient discharge therefor.

Where a Committee or Manager of the depositor's estate has been duly appointed, nothing in this section authorises payments to any person other than such Committee or Manager.

#### *Deposits made by Married Women.*

13. Any deposit made by or on behalf of a married woman, or by or on behalf of a woman who afterwards marries, may be paid to her, whether or not the Indian Succession Act, 1865, section four, applies to her marriage; and her receipt for money paid to her under this section shall be a sufficient discharge therefor.

#### *Rules.*

14. All certificates under section eight, and all payments under section ten, section twelve or section thirteen, shall be respectively granted and made by the Secretary of the Bank, subject to such rules consistent with this Act as the Governor-General in Council may, from time to time, prescribe.

WHITLEY STOKES,  
*Secretary to the Govt. of India.*

# ACTS

## OF THE

### COUNCIL OF THE LIEUT.-GOVERNOR OF BENGAL.

*(Received the assent of His Excellency the Governor-General on the 7th March, 1873.)*

#### ACT NO. I OF 1873.

*An Act to amend the Salt Act, 1864.*

WHEREAS by "The Salt Act 1864" being Bengal Act VII of 1864, <sup>Preamble</sup> Section 3, it is enacted that the word "Magistrate" means any person exercising the full powers of a Magistrate under the Code of Criminal Procedure, Act XXV of 1861; and whereas the said Act XXV of 1861 has been repealed by the Code of Criminal Procedure, Act X of 1872, by which later enactment new rules have been enacted, assigning the several powers of Magistrates of the first, second, and third classes:

And whereas reference is made in the Salt Act, 1864, to Act XIII of 1856 (*for regulating the Police of the Town of Calcutta, &c.*) and Act XLVIII of 1860 (*to amend Act XIII of 1856*), which enactments have been repealed, so far as they relate to the Town of Calcutta, by "The Calcutta Police Act, 1866," being Bengal Act IV of 1866:

It is hereby enacted as follows:—

1. All the powers, which under the provisions of The Salt Act, 1864, <sup>Power of Magistrate under the Salt Act, 1864</sup> may be exercised by a Magistrate, may be exercised by a Magistrate of the first or second class, subject to the provisions of Section XX of the Code of Criminal Procedure.

2. All offences, punishable under the provisions of The Salt Act, 1864, <sup>Offences under said Act to be tried by whom.</sup> may be inquired into and tried by a Magistrate of the first or second class.

3. All references made to the said Act XIII of 1856, and the said <sup>References in the said Act to Calcutta Police Act</sup> Act XLVIII of 1860, in The Salt Act, 1864, shall be taken to be made to The Calcutta Police Act, 1866.

L. A. GOODEVE,

*Offg. Asst. Secy. to the Govt. of Bengal,  
Judicial and Legislative Departments.*

*(Received the assent of His Excellency the Governor-General on the 16th May, 1873.)*

#### ACT NO. II OF 1873.

*An Act to amend the District Municipal Improvement Act and the District Towns Act.*

WHEREAS it is expedient, in modification of the District Municipal Improvement Act, being Bengal Act III of 1864, and the District Towns Act, being Bengal Act VI of 1868,

to provide for the election and rotation of municipal commissioners in places to which the operation of the said District Municipal Improvement Act has been or may be extended;

and to provide that such municipal commissioners may elect their vice-chairman;

and to provide that municipal bodies constituted under the provisions of the said District Municipal Improvement Act and the said District Towns Act shall be enabled, to apply part of the funds under their charge to the establishment and maintenance of schools, and at the same time to ensure the voluntary application of the fund, to such and similar purposes;

and, for the sake of convenience in keeping the public accounts, to empower the

Government to fix the date of the commencement of the municipal year ;

It is hereby enacted as follows :—

1. The Lieutenant-Governor may, at any time, direct that the whole or any number, not less than two-thirds, of the municipal commissioners, whom he is empowered to appoint by section 6 of the said District Municipal Improvement Act, shall be elected by the rate-payers, subject to such rules in regard to qualification and election as he may think fit. In any such election every person shall be entitled to vote who has paid the rate upon houses, buildings, and lands, that has become payable by him during the preceding year. All the provisions of the said section shall apply to commissioners so elected.

The Lieutenant-Governor may, at any time, withdraw such direction for the election of municipal commissioners.

2. Save as is hereinafter provided, every municipal commissioner shall vacate his office at the end of three years.

When municipal commissioners are for the first time appointed or elected in any place to which the said District Municipal Improvement Act shall have been extended, one-third of the whole number (exclusive of the officers declared to be *ex-officio* commissioners by section 7 of the said Act and section 7 of Bengal Act VII of 1867) shall retire at the end of one year, and another third at the end of two years, and the rest at the end of three years, to be computed from the first day of the year next following the date of the appointment or election of such commissioners. In case such whole number is not evenly divisible by three, the one-third shall be ascertained by taking the number next below it, which is evenly divisible by three, as the number to be divided. The commissioners who shall retire at the end of the first and second years respectively shall be decided by lot.

For the purposes of this section, the present municipal commissioners holding office in any place to which the said Act has already been extended, shall be deemed to have been appointed on the date of the passing of this Act.

When any commissioners have been elected under the provisions of the last preceding section, the foregoing rule for the rotation of commissioners shall be applied separately to the commissioners who have been appointed, and separately to the commissioners who have been elected.

Any person appointed or elected to any vacancy caused by the resignation, or discharge, or removal or death of a commissioner, shall fill such vacancy for the unexpired remainder of the term for which the outgoing member may have been elected or appointed.

Any person who vacates office under the operation of the rule of rotation prescribed in this section may be at any time re-appointed or re-elected.

3. The Lieutenant-Governor may delegate to the municipal commissioners appointed under the said District Municipal Improvement Act the power to elect one of themselves to be their vice-chairman, subject to the approval of the Lieutenant-Governor. Provided that the vice-chairman, on the occurrence of a vacancy, shall always be elected by the commissioners, whenever any number of such commissioners has been elected under the provisions of section 1. Such vice-chairman shall hold office for one year, and shall be eligible for re-election at the end of each year, and may at any time be removed from office by the municipal commissioners by a resolution, in favor of which not less than two-thirds of the commissioners shall have voted. Provided that it shall be lawful for the Lieutenant-Governor to sanction the election permanently or for a term of years of a salaried vice-chairman if proposed by the commissioners.

4. In addition to the purposes to which the municipal fund may be applied under the provisions of section 16 of the said District Municipal Improvement Act, the said fund may be applied by the municipal commissioners, subject to the provisions of the said section,

Application of rule separately to appointed and to elected commissioners

Municipal commissioners may be elected in places to which the District Municipal Improvement Act is extended.

Application when a commissioner has been appointed to fill a vacancy caused by resignation, discharge, removal or death.

Municipal commissioner to vacate office at the end of three years.

Rotation of commissioners

Municipal commissioners, in places to which the District Municipal Improvement Act is extended, may be authorized to elect their vice chairman

Application of rule to present municipal commissioners holding office in any place to which the said Act has already been extended, shall be deemed to have been appointed on the date of the passing of this Act.

The municipal fund may be applied to the establishment and maintenance of schools.

and, subject to such conditions as the commissioners may think fit to impose, to the establishment and maintenance of schools.

5. In addition to the purposes to which the town fund may be applied under the provisions of section 13 of the said District Towns Act, the said fund may be applied, subject to the provisions of the said Act, and subject to such conditions as the committee may think fit to impose, to the establishment and maintenance of schools.

The town fund may be applied to the establishment and maintenance of schools

6. Provided that no portion of the said municipal fund or of the said town fund shall be applied, under the provisions of sections 8 and 9 of Bengal Act VII of 1867, or of section 13 of the said District Towns Act, or of this Act, to the establishment and maintenance of schools, or hospitals, or dispensaries, or to the promotion of vaccination, unless such application be sanctioned by the consent of a majority of the municipal commissioners or of the members of the town committee respectively, at a meeting specially convened for considering the question of such application.

7. For section twenty of the said District Municipal Improvement Act, the following section shall be substituted:—

“20. The chairman or vice-chairman shall, for the transaction of the business connected with, or for the purpose of making any order authorized by, this Act, exercise all the powers vested by this Act in the municipal commissioners.

Chairman and vice-chairman to exercise the powers of the commissioners.

Provided that it shall not be lawful for the chairman or vice-chairman to act in opposition to, or in contravention of, any order of the commissioners at a meeting, or to exercise any power which it is by this Act expressly declared shall be exercised only by the commissioners at a meeting.”

8. Notwithstanding anything contained in any of the Acts mentioned in the schedule hereto annexed, the Lieutenant-Governor may, from time to time, by a notification in the *Calcutta Gazette*, fix the dates on which accounts and estimates shall be prepared and

The Lieutenant Governor may fix the dates to be observed by municipal bodies, and the date from which the year shall commence.

furnished by the commissioners, the municipal commissioners, or the town committee, appointed under the provisions of the said Acts respectively; and the date of the first day of the year, which shall be used by them for making estimates, regulating taxes, registering carts and other wheeled vehicles without springs, and doing all such things as by law they are required to do.

#### SCHEDULE.

Number of Act	Title
Act XXVI of 1850	To enable improvements to be made in towns
Bengal Act III of 1861	The District Municipal Improvement Act.
Bengal Act VI of 1867	For the better regulation of the police in towns and municipalities in the territories under the control of the Lieutenant Governor of Bengal
Bengal Act VII of 1867	To amend Act III of 1861
Bengal Act VI of 1868	The District Towns Act

L. A. GOODEVE,

*Offg. Asst. Secy. to the Govt. of Bengal,  
Judicial and Legislative Departments.*

(Received the assent of His Excellency the Governor-General on the 19th May, 1873.)

### ACT No. III OF 1873.

*An Act to amend Section 9, Act XI of 1849, and Section 27, Act XXI of 1856.*

WHEREAS it is expedient to amend Act XI of 1849 (for securing the *Abkari* revenue of *Calcutta*), and Act XXI of 1856 (to consolidate and amend the law relating to the *Abkari* revenue in the Presidency of *Fort William* in *Bengal*);

It is hereby enacted as follows:—

1. For section nine of the said Act XI of 1849 the following section shall be substituted:—

“9. Whenever a license shall be granted under this Act, the Collector shall be authorized to demand, in consideration of the privileges granted, such fee, tax, or duty, as may from time to time be fixed with the

Fee, tax, or duty, payable for license.

sanction of the Board of Revenue; or a fee, tax, or duty, adjusted or regulated in such manner and in accordance with such rules as the Board of Revenue may prescribe; and such fee, tax, or duty, shall be specified in the license, and shall be payable in advance or at such periods as the said Board may direct."

2. For section twenty-seven of the said Act XXI of 1856, the following section shall be substituted:—

"27. Persons taking out licenses for the retail sale of spirituous and fermented liquors as aforesaid shall pay for every such license such fee, tax, or duty, as may from time to time be fixed with the sanction of the Board of Revenue; or a fee, tax, or duty, adjusted or regulated in such manner and in accordance with such rules as the Board of Revenue may prescribe; and such fee, tax, or duty, shall be specified in the license, and shall be payable in advance or at such periods as the said Board may direct. Any sale of spirituous or fermented liquors as aforesaid in less quantity than two imperial gallons or one dozen of quart bottles shall be held to be a retail sale."

L. A. GOODEVE,

Offg. Asst. Secy. to the Govt. of Bengal,  
Judicial and Legislative Departments.

Received the assent of His Excellency the Governor-General on the 25th June, 1873.)

## ACT No. IV of 1873.

### An Act for Registering Births and Deaths.

WHEREAS it is expedient to provide the means for a complete register of births and deaths,

It is hereby enacted as follows:—

The Lieutenant-Governor may at any time, by a notification published

The Lieutenant-Governor may direct that all births, or deaths, or both, shall be registered in any area; and any such area may be defined in such notification shall be registered, and for that purpose may define the limits of such area.

From and after such date this Act shall apply to the whole of the area so defined.

2. The magistrate of the district may, for the purpose of such registration, divide any such area into such and so many districts as he may think fit, and may appoint one or more persons to be registrars of births, or of deaths, or of births and deaths, within such district, and may at any time for sufficient reason dismiss any such registrar, and may fill up any vacancy in the office of registrar.

The magistrate shall cause to be published a list containing the name and place of office of every registrar in the area, and specifying the hours of the day during which such registrar shall attend at his office for the purpose of registration.

3. Every registrar shall have an office within the district of which he is appointed registrar, and shall cause his name, with the addition of registrar of births (or of deaths, or of births and deaths, according to his appointment) for the district for which he is so appointed, and notice of the hours during which he will attend for the purpose of registration, to be affixed in some conspicuous place on or near the outer door of his office.

4. The magistrate shall cause to be prepared a sufficient number of register books for making entries of all births or deaths or both, according to such forms as the Lieutenant-Governor may from time to time sanction; and the pages of such books shall be numbered progressively from the beginning to the end, and every place of entry shall be also numbered progressively from the beginning to the end of the book; and every entry shall be divided from the following entry by a line.

5. Every registrar shall inform himself carefully of every birth, or of every death, or of both, according to his appointment, which shall happen in his district, and shall register, as soon as conveniently may be after the event, without fee or reward, the particulars required to be registered, according to the forms mentioned

THE 12TH JUNE 1873.

Present :

The Hon'ble J. B. PHEAR and }  
 „ „ W. AINSLIE. } Judges.

CASE NO. 1688 OF 1872.

*Special Appeal from a Decision passed by the Subordinate Judge of Sarun, dated the 31st July 1871, reversing a decree of the Moon-siff of Chumparun, dated the 31st July 1871.*

Mr. John Stalkart, Manager of  
 Tatturiah Factory (Defendant) Appellant.

versus

Gopal Pandv and others, (Plain-  
 tiffs,) ... Respondents.

For Appellant.—Mr. R. E. Twidale.

For Respondents.—Mr. C. Gregory.

1. A co-sharer of lands which have not been partitioned is part owner of every biga of such lands and can claim either to occupy the land himself jointly with his co-sharers or their assignees or to insist that the lands shall not be occupied and used by any person (excepting always persons having a right of occupancy) otherwise than with his assent.

2. The exclusive possession of such undivided lands by one co-sharer without the consent of the others amounts to such an invasion of their proprietary right as amounts to at least a trespass and under such circumstances a Court of equity is justified in protecting their interests by a perpetual injunction if it sees on all the facts to do so.

*Phear, J.*—The facts of this case seem to be hardly disputed. The plaintiff may be described, as the 4 annas shareholder, and the defendant as the 12 annas shareholder, in a certain mouzah.

In the four years which preceded 1277, the defendant also held a ticca lease of the plaintiff's 4 annas, and so had the whole 16 annas himself. During this time he took into his sole occupation certain lands, which, it is said, were abandoned by the ryots, and he planted them with indigo.

In 1277 the ticca lease of the 4 annas came to an end, and the 4 annas share, therefore, reverted to the plaintiff. The first act of the plaintiff was to object to the possession and occupation of the ryotee land by the defendant, and to his cultivating it with indigo. Nevertheless, the defendant took steps for carrying on the cultivation and thereupon the plaintiff brought this suit, seeking therein to have it declared that he was 4 annas shareholder over the whole mouzsah; and, further, asking for an

injunction against the defendant to restrain him from cultivating indigo in the lands in question.

The defendant does not dispute plaintiff's facts, or deny that he was about to continue the cultivation of the indigo, notwithstanding the dissent of the plaintiff. But his case is that, as *malik* of 12 annas, he is entitled to do this; and he also, I believe, in the first Court, said by the mouth of his pleader that he is ready to pay such ryotee rent to the plaintiff as may be fair and reasonable.

The lower Appellate Court declares the plaintiff's right as claimed, and issued the injunction.

It appears to me plain upon these facts that the defendant has disturbed that enjoyment of the plaintiff in the lands in question to which he was entitled as a 4 annas shareholder. The lands have not been partitioned, and as holder of an undivided 4 annas share he is part-owner of every beegha of the whole mouzah; and by virtue of that right of ownership, I apprehend that he can claim either to occupy the land himself jointly with the defendant or the defendant's assignees, or to insist that the land shall not be occupied and used by any person (excepting always persons having a right of occupancy) otherwise than with his assent. The defendant, however, has personally taken *exclusive* occupation of a certain portion of the soil, and maintains that he has a right to enjoy that exclusive occupation, whether the plaintiff accords him his permission or not. This appears to me to be a complete disclaimer of the plaintiff's right as 4 annas shareholder, and to the extent to which the defendant has acted up to his assertion, he had ousted the 4 annas shareholder from his rights in the land. In a case in England, wherein three persons, tenants in common of certain lands to the extent of 5-6ths of it, leased the land to a Railway Company, who made a railway upon it, this was held to be such an exclusion of the remaining tenant in common (1-6th shareholder) from the land, such an obstruction to his right of entrance upon the land, as to amount to ejectionment (*See Durham and Sunderland Railway vs. Watson*, 3 Beav. 119, and 5 M. & W., 564). So here the one shareholder, the defendant, has taken *exclusive* possession of the soil, not, as in the case cited, through a tenant, but



by his own hand. He does not say that events have occurred which for any reason render it obligatory upon, or the duty of, the plaintiff to assent to his (the defendant's) possession and cultivation of the land. He maintains that he has a right to do what he has done, altogether regardless of the plaintiff's will in the matter. He is not receiving from occupiers of the land rents to a share of which the plaintiff is entitled; he is not himself occupying the land as tenant under the plaintiff and himself as joint-landlords; he is not cultivating and managing the land for the common profit of the plaintiff and himself though he may be willing to pay a reasonable rent; he is occupying for himself alone, and keeping the plaintiff off the land.

If this be so, the possession which he has taken seems to me unquestionably such an invasion of the plaintiff's proprietary right as amounts at least to a trespass, and the plaintiff has good cause to come into Court to complain of that trespass, and to have his right vindicated and declared. He does not ask for damages, but he asks for an injunction in order that the defendant may be prevented from repeating his acts of trespass, and from continuing his invasion of the plaintiff's right in the property. It seems to me that the plaintiff has established his right to the declaration as against the defendant of his being a 4 annas shareholder in the land, which is the subject of suit jointly with the defendant, and of his being entitled as such shareholder to joint-possession of the land, together with the defendant, and he has further, I think, made out a good claim to such remedy as the Civil Court, considered as a Court of Equity, can give him against repetition of the trespass complained of.

In ordinary cases of trespass no doubt, where the trespasser is a mere stranger, a judgment which authoritatively declares the plaintiff's right, and awards him damages, affords sufficient relief. But in the present case the defendant himself is entitled to possession as well as the plaintiff, and his wrongful act has been committed under claim of right. Under circumstances such as these, it appears to me that a Court of Equity is justified in protecting the plaintiff's interest by a perpetual injunction, if it sees fit on all the facts to do so; and I think that there are many English authorities to this effect (*See Lowndes vs. Bette*, 10 J. N. W. S., 226). The Court, no doubt, will not generally

interfere by injunction to control a tenant-in-common's dealing with joint-property which is rightly in his possession, unless those dealings threatened to be of a destructive character, but it will compel him to allow his co-tenant a proper share in the enjoyment of the property. In this view the injunction, in the form which the Lower Appellate Court has given to it, is probably not altogether satisfactory. It should be expressed in such a way as to be limited to the prevention of the particular trespass of which the defendant has been proved guilty. That trespass has been in fact an ouster of the plaintiff from the enjoyment of the property by the act of taking exclusive possession of certain land against his consent. I think, therefore, the injunction ought to be directed particularly to this conduct, and the defendant ought to be restrained from excluding the plaintiff from possession of the land as joint-sharer, and also restrained from taking exclusive possession of the land, or retaining exclusive possession of the land, or from giving exclusive possession of it to any person by lease, or otherwise with the consent of the plaintiff. In effect, the appeal is dismissed, and the appellant must pay the respondent his costs.

*Ainslie, J.*—I concur.

THE 12TH JULY 1873.

*Present :*

The Hon'ble J. B. PHEAR and } *Judges.*  
" " G. G. MORRIS, }

CASE NO. 1358 OF 1872.

*Special Appeal from a Decision passed by the Judge of Bhaugulpore, dated the 6th March 1872, affirming a decree of the Subordinate Judge of that district, dated the 29th December 1870.*

Lala Khem Narain Singh, *alias*  
Rameshur Lal (Plf.,) ... *Appellant,*

*versus*

Oodwant Singh, (Defendant) ... *Respondent.*

*For Appellant.*—Moonshee Mahomed Yousuf.

*For Respondent.*—Baboo Obinash Chunder Banerjee.

In a suit in which a court of first instance did not perform its duty by looking closely at the testimony and behaviour of each witness separately, and endeavouring to judge how far and to what extent that testimony was to be accepted as true,—its finding relative to the principal issue between the parties, not proceeding upon a most careful and conscientious consideration of all the materials which could be availed of, for the purpose of guiding its judgments and the Appellate Court without giving any reasons why it abstained from directing its attention to the testimony of the witnesses in detail, disposed of the case upon *a priori* probabilities inferred from facts which lay outside the case altogether, the High Court in special appeal reversed the decisions and ordered a new trial.

We are of opinion that the trial in the first Court was so imperfect, so incomplete, and so unsatisfactory, that we ought not to allow the decision, which has been passed upon the materials so obtained, to stand.

In this case the matter of contest between the parties was a very serious one indeed. The plaintiff sued the defendant upon the footing of a bond, which he alleged that the defendant had executed in his favor. If the finding, so to call it, which the Lower Courts have arrived at, be correct, then the plaintiff has committed a most deliberate perjury and forgery,—a forgery, I may say, of the very worst character, because it is a forgery of a bond effected for the sole purpose of suing the antagonist upon it, and putting him to the harassment and vexation of a false suit. This much only need be stated in order to satisfy any one, with a very little consideration, that the finding of the Court relative to the principal issue between the parties ought to have proceeded upon a most careful and conscientious consideration of all the materials which could be availed of for the purpose of guiding the judgment of the Court. Instead, however, of the proceedings in the first Court having been of this character, it seems to us that the trial was there had in a very perfunctory manner. Both the plaintiff and the defendant gave their testimony; and other witnesses were examined on the side of the plaintiff; and it is strange enough that none of the witnesses on the one side or the other were made to speak to the real point in issue between the parties, namely, the authenticity of the alleged signature of the defendant appearing on the deed in question. They were not properly examined; they were not cross-examined at all, so far as regards any real result to be got from cross-examination. In a case of this kind, it is most important to ascertain how the parties stood relatively to each other at the time of the alleged making of the bond: it was very relevant to the matter to ascertain whether

the defendant had any apparent occasion for borrowing the money as the plaintiff said he did. It was most important to enquire into the allegations which the defendant himself made and particularly whether he was a man who had incurred debts of this kind before, because he seems to have declared that he had not. But nothing of this sort is attempted to be brought out of any of the witnesses. And the first Court, when it expressed its conclusion that the case of the plaintiff was false, and therefore the case of the defendant was true, did not discuss, or in any way examine the evidence, poor as it was, which the witnesses had given.

A Court of Justice, in trying a case in the first instance, does not perform its duty, unless it looks closely at the testimony and behaviour of each witness separately, and endeavours to judge how far and to what extent that testimony is to be accepted as true. The Subordinate Judge, without giving us any reason why he abstains from directing his attention to the testimony of the witnesses in detail, disposes of the case upon *a priori* probabilities inferred by him from facts which, I may say, lie almost outside the case altogether. His inferences hardly in any particular rise above the character of mere speculation. They certainly ought not to have been allowed to constitute the preponderating weight by which the inclination of the balance between the two parties was to be determined, and the testimony of the plaintiff and his witnesses *en-masse* overborne, irrespective of its intrinsic merits and demerits.

Enough has been said to show the grounds upon which we consider the trial in the first Court was not a sufficient trial in the case between the parties. The fault was such as could not be cured in the Appellate Court, and, even if it could have been, the Judge seems to have made no step towards doing so. We consequently find ourselves under the necessity of reversing the decisions of both the Courts below, and of remanding the case to the Lower Appellate Court with directions to that Court to send it to the Subordinate Judge's Court, in order that the parties may there be afforded an opportunity of recalling their witnesses and of adducing such further evidence as they may respectively desire, and that the Subordinate Judge may try it anew.

Costs must be costs in the cause, and must abide the event.

We will add that this seems to us eminently a case in which the Court of first instance might take the step of confronting the parties and the witnesses with one another. That course very often furnishes, or leads to, satisfactory tests of the relative veracity of the respective deponents. We trust that the Subordinate Judge will give his best attention to the case, and endeavour to effect a speedy and complete trial of the matter in contest between the parties.

THE 22ND JULY 1873.

*Present :*

The Hon'ble SIR R. COUCH,  
Knight, ... *Chief Justice,*  
and

The Hon'ble F. A. GLOVER, *Judge.*

CASE No. 1683 OF 1872.

*Special Appeal from a decision passed by the  
Officiating Subordinate Judge of Beerbhoom,  
dated the 6th August 1872, affirming the  
decree of the Moonsiff of Bolpore, dated the  
10th of February, 1872.*

Joyram Gossamee Bhuttacharjee,  
plaintiff, ... *Appellant,*  
*versus*

Kali Narain Rai, defendant, ... *Respondent.*  
*For Appellant.*—Baboos Sreenath Doss and  
Doorga Mohun Doss.

*For Respondent.*—Baboo Unnodapershad Banerjee.

An instrument which operates as a charge upon a property to be sold to the extent of Rupees 100 as earnest money comes within the provision of Clause 2 Section 17, Act VIII of 1871 and therefore ought to be registered.

*The Chief Justice.*—The words of the 2nd clause of section 17 of Act VIII of 1871, require that an instrument which purports or operates to create an interest of the value of one hundred Rupees, or upwards, in immovable property shall be registered; and the judgment of the Judicial Committee in the case in XIV Moore's Indian Appeals, page 129, shows that not merely the language of the instrument is to be looked at, but it is to be seen whether it does in effect operate to create a charge. Their Lordships said, of the document in that case, that it

was an instrument acknowledging payment of consideration money for what was to be ultimately an absolute sale of the property in question, and what in equity would operate as a sale of the property. They did not refer to the words, "we have sold" which occur in it, but they based their decision upon its operating as a sale of the property.

We have to see then what was the operation of the instrument in this case. It appears from the statements in it, that the parties had agreed upon a sale of the property for 400 Rupees and the terms had been settled; that the seller being in urgent want of money, wished to have an advance of 100 Rupees on account of the consideration money, and that was paid to him. The instrument which is not artificially drawn, appears to me to shew that what the parties intended and what the purchaser might very well insist upon, was, that he should have a security upon the property for the one hundred Rupees that he was going to advance. We are not to look at the precise words used so much as the intention of the parties to be gathered, generally from the instrument. I think it was intended that, in the event of the sale not being completed, the seller refusing to complete it, or trying to sell it to any one else, the purchaser should have a charge upon the property for the money. This instrument operated as a charge upon the property to the extent of 100 Rupees, and comes within the terms of the section. And it was necessary that it should be registered.

The appeal must be dismissed with costs.

THE 8TH AUGUST 1873.

*Present :*

The Hon'ble SIR R. COUCH, *Kt., Chief Justice.*  
" F. A. B. GLOVER... *Judge.*

CASE No. 1642 OF 1872.

*Special Appeal from a decision passed by the  
Deputy Commissioner of Kamroop, dated  
the 21st June 1872, affirming a decree of  
the Sudder Moonsiff of that district, dated  
11th October 1871.*

Nur Nath Dass Roy and  
others, ... *(Defds.) Appellants,*  
*versus*

Godo Calita... *(Plffs.) Respondent.*

*For Appellant.*—Baboo Nullit Chunder Sein.

*For Respondent.*—Baboo Obhoy Churn Bose.

When plaintiff sues to recover possession of a property on the ground of purchase from defendant, it is not incumbent upon the defendants who rested their defence upon defendant's being a member of a joint Hindu family, to prove that defendant was in possession jointly with the other members of the family and that his possession was a separate possession on his own account.

*Couch, C.J., (Glover, J., concurring)*—The plaintiff claims possession of the land the subject of the suit on the ground that he had purchased it from Dusrut.

The defendants dispute his right to the land on the ground that Dusrut was one of a joint Hindoo family, and that he could not give to the plaintiff a title to the whole of the land.

The Deputy Commissioner shows, by his judgment, that the pottah for this land was formerly in the name of Dusrut's father, Jhoparoo, that Dusrut had a brother, and that after Jhoparoo's death a pottah was issued in the name of Dusrut, but that he was the eldest member of the family, and the Deputy Commissioner held that the defendants ought to have given evidence of his being in possession jointly with the other members of the family, and of his possession not being a separate possession on his own account.

It does not appear to have been disputed that when Dusrut sold to the plaintiff, the family was a joint Hindoo family; but whether it was disputed or not, it has been long settled that the primary state of every Hindoo family is that of a joint-family. It is so stated in Strange's Hindoo law, page 225, and without alluding to any intermediate decisions it has been said so most emphatically by the judicial committee of the Privy Council in XII, Moore's Indian Appeals, page 540. Their lordships say there that "the normal state of every Hindoo family is joint."

Presumably every such family is joint in food, worship and estate. In the absence of proof of division such is the legal presumption, but the members of a family may sever, in all or any of these things. We must therefore consider that this was a joint family.

Then, according to several authorities, the Pottah being in the name of Dusrut, raises no presumption that the property was not

the property of the family. There is a case in Marshall's Reports the head note of which is "In a Hindoo undivided family the mere fact that one brother's name was used in documents relating to property affords no presumption of his being sole proprietor, especially where he is the eldest brother or is shown to be the managing member of the family." Dusrut is said by the Deputy Commissioner to have been apparently the eldest member of the family at that time. The note I have read is correct, and the words are taken from the judgment.

In another case which is in the second volume of the Indian Jurist, page 261, in the judgment of the Judicial Committee of the Privy Council, the same law is laid down; and in a decision of this Court in the VI Weekly Reporter, page 70, where the question was, whether the property in dispute was the self-acquired property of the plaintiff, one of three brothers, or the joint property of himself and his two brothers, the Principal Sudder Ameen had thrown upon the plaintiff the onus of showing that the property was self-acquired, and the Judge in appeal had reversed that decree, and this Court in its judgment says, "the Judge has thrown the onus upon the wrong party. It is not denied that the three brothers were joint in food and estate. The defendant must therefore strictly prove that the estate which he purchased was acquired by Beharee. The Judge deals in assumptions, to wit, that because Beharee was a Mokhtar, he must have made much money and acquired property separately, forgetting that it is difficult to realise a correct notion of a joint Hindoo family unless it is supposed that the members bring their earnings into the common stock.

There has been no evidence of separation, and the mere fact of property standing in the name of one of the members of a joint family alone is no index whatever of the real owner. Neither is the existence of separate possession any evidence of separate acquisition unless it be shewn that the shareholder, exercising his possession separately, was permitted by the consent of the other sharers to open and keep a separate account of his own and not to carry his earning to the common stock. Then the learned Judge says, "this is in conformity to repeated rulings of our Court and of the late Sudder Court."

The case must therefore go back upon the authorities, it is clear that the Deputy Commissioner has thrown the onus upon the wrong party; as the case stood it was not for the defendants to give the evidence which he required them to give. The decree must be reversed, and the suit must be remanded for trial.

THE 9TH AUGUST 1873.

*Present :*

THE Hon'ble SIR R. COUCH, *Kt. Chief Justice,*  
and

THE Hon'ble F. A. GLOVER, *Judge.*

CASE No. 1773 OF 1873.

*Special Appeal from a decision passed by the Deputy Commissioner and Subordinate Judge of Nowgong, dated the 30th of September 1872, affirming the decree of the Moonsiff and extra Asst. Commissioner of Nowgong, dated the 29th of June 1872.*

Koondo Nath Surma Gosamy,  
(defendant) ... .. *Appellant,*

*versus*

Dheer Chundro Surma, Odhikaree Goswamy,  
(plaintiff) ... .. *Respondent.*

*For Appellant.*—Baboos Sreenath Dass and  
Bhuggobutty Churn Ghose.

*For Respondent.*—Baboo Chunder Madhub  
Ghose.

Held that the office of Odhikaree if not strictly immovable property, is so much of the nature of immovable property, that the Court within whose district the chief seat of the office is, has jurisdiction to entertain a suit for the purpose of determining the title to it.

When a defendant, although resident beyond the jurisdiction of the Court in which he is sued, asserts in his written statement that the headship of the Odhikaree which the plaintiff alleges to be situated at N., is situate elsewhere beyond its jurisdiction, and that he is in reality the Odhikaree, that is evidence that he is asserting a title adverse to the plaintiff and that the Court in which the suit is brought is justified in pronouncing a decree declaring the title of the plaintiff.

Under section 13 Act I of 1872 judgments *inter partes* are relevant and evidence against third parties where the question is as to the existence of any right or custom.

It appears that plaintiff alleged that he was the Adhicari of the Difloo Shastur, that on the 15th Aghran 1277 B. S., defendant No. 1 came to Gudarbary in the district of Newgong and in conjunction with defendant No. 2 gave out, that he defendant, No. 1 had been duly installed Adhicari of the said Shastur, that the 2 defendants, having since travelled through the districts of Newgong, Durnug, Sibsagar, Luckimpore and

Debrugurh collected the annual presents due from the disciples of the said Shastur—a proceeding which has interfered with his the plaintiff's right to the said post of Adhicari, and that therefore plaintiff prayed that defendant be restrained from interfering with the disciples of the said Shastur by a declaration of plaintiff's right to the post of Adhicari as aforesaid.

Defendant No. 1 stated that plaintiff was not the Adhicari of the Difloo Shastur, and that he defendant has been Adhicari since the last 19 years, that the seat of the Difloo Shastur was not in Nowgong but in upper Assam, that plaintiff had no cause of action, that defendant No. 1 was a resident of Jorehaut and did not come to collect any presents in Newgong that therefore the court of Newgong had no jurisdiction to entertain the suit, that defendant No. 2 was a creature of the plaintiff's and that he defendant No. 1 had no connection with him, defendant No. 2, who supported the plaintiff.

Upon these pleadings the following among other issues was framed by the court of first instance.

"Whether the plaintiff had any cause of action against defendant No. 1, as alleged by him, and if he has, whether this court has jurisdiction in this case."

The first court dismissed the plaintiff's suit, the findings being

"There is no particle of evidence either in the depositions of plaintiff's witnesses or in the written statement, examination on oath and depositions of witnesses of defendant himself, that defendant ever set up this adverse title in the district of Newgong and that defendant No. 1 being admitted to be a native of Sibsagar, this court had no jurisdiction."

The Moonsiff also found "plaintiff's pleader failed to shew any evidence on the record leading to prove his alleged cause of action against defendant No. 1, viz. that defendant No. 1 had come down to the district of Newgong in Aghran 1277 and having represented and proclaimed himself as Adhicari of the Difloo Shastur collected tribute here and elsewhere."

On appeal by plaintiff the case was remanded to the the Court of first instance for trial on the merits.

Upon the merits the case was decreed by the original Court. The Moonsiff says—

"Now, regarding the merits of the case, the evidence on the record proves to the Court's satisfaction that the law governing the succession to the Adhicariship of the Difloo Shastur is called 'Jestanocrama' or the law of the elder. That this is the law of the Shastur will appear from the judgment in suit No. 1 of 1856 of the Court of Assistant Commissioner of Newgong, dated 12th February 1857, confirmed in appeal on 5th June 1857, and in suit No. 630 of 1869 of the Court of the Moonsiff of Newgong, dated 28th December 1869, and judgments like these being analogous to judgments in rem are evidence against the whole world and may be read as evidence in the present suit. Besides there is oral evidence in the record sufficient to corroborate these judgments."

On appeal by the defendant No. 1 the decision of the first Court was affirmed. The Appellate Court observed "It is true he (plaintiff) failed to shew in evidence what loss pecuniarily he had sustained by any conduct of Appellant adverse to his interest." "The previous decisions and judgments of other courts, as quoted by the Moonsiff, all tends to confirm the plaintiff's right and title to Adhicariship."

In Special Appeal it was argued on behalf of defendant No. 1, that plaintiff having failed to prove that:—he, defendant No. 1 had collected presents from plaintiff's disciples in Newgong and elsewhere, as found by the Court of first instance, the Nowgong Court had no jurisdiction; that there was no cause of action upon which plaintiff might sue, that the decisions relied upon by the lower courts were no evidence, as defendant No. 1 was no party in the suits to which they related and that the courts below had misconstrued the decisions of 19th April and 15th August 1863.

It was contended on the part of Respondent, that the seat of the Difloo Shastur being in Newgong, the courts of that district had jurisdiction, that the setting up of an adverse title was a sufficient cause of action, and that the decisions referred to were evidence *quantum valeat* against (Defendant No. 1) under the law although he was no party in the suit in which these decisions were passed.

*Couch, C. J. (Glover, J., concurring.)*—THE suit was brought for a declaration or confirmation of the title of the plaintiff to the Office of *Odhikaree* of the Difloo Shastur,

and for damages sustained by the plaintiff by reason of the defendant having disturbed him in the possession of the office.

The seat of this office was at Nowgong, and the rights and duties appear to be such that I think it must be considered for the purpose of a suit for confirming or declaring the title to it, as immovable property. If not strictly immovable property, it is so much of the nature of immovable property, that the Court, within whose District the chief seat of the office is, should have jurisdiction to entertain the suit for the purpose of determining the title to it. Then the question is whether there was a cause of action to justify the decree that has been made by the Lower Courts, a decree declaring the title of the plaintiff to the office, and giving to him merely one Rupee damages.

There appears to be no evidence except hearsay that the defendant came to Nowgong or endeavoured to collect any tribute, as it may be called, within the district; but the defendant's written statement shows that he asserted a title to the office. The written statement is evidence against him that he was claiming the office, and was disputing the title of the plaintiff to it. The defendant seems to have asserted that the headship of the *odhikaree*, which the plaintiff alleged to be situated at Nowgong, was situate elsewhere, and that he was in reality the *odhikaree* of the Difloo Shastur. I think there is evidence that he was asserting a title adverse to the plaintiff, and that the Court had before it materials on which it was justified in pronouncing a decree declaring the title of the plaintiff.

As to the award of one rupee as nominal damages, it may be a question whether the Court was right in awarding damages. But it has not been made a ground of objection in the special appeal, and seeing that the costs of the suit are only awarded in proportion to the one rupee damages, it is not a matter of consequence.

Another objection which has been taken is, that the Lower Courts have made an improper use of certain judgments or decrees which are mentioned in the judgment of the first Court. The Deputy Commissioner appears to adopt the judgment of the Moonsiff, and he says upon this part of the case: "The previous decisions and judgments of other Courts as quoted by the Moonsiff all tend to confirm the plaintiff's right and title

to the odhikareeship, and it appears to me the plaintiff succeeded to the title in the usual legitimate recognized manner according to the custom in vogue." He makes no allusion to the oral evidence, but he had previously said, "I consider the moonsiff was fully justified, on the oral and documentary evidence adduced, in determining the suit in the respondent's favor," from which, I think, although he did not in the passage I have quoted allude to the oral evidence, he considered that, as much as well as the documentary.

In order to see more precisely the value of the oral and documentary evidence, we must look at the judgment of the Moonsiff. In that, the Moonsiff uses the previous decrees for two purposes. Upon the issue, whether the claim was barred by the law of the limitation, he says, "Besides the oral evidence adduced by the plaintiff," the judgment of Major John Butler, Assistant Commissioner of Nowgong," dated the 12th of February 1857, "and then states the different judgments, and says, "prove to the Court's satisfaction that Koosho Chunder Ghossamee was the last odhikar of the Difloo Shastur, and that on his death "the plaintiff succeeded him to the odhikarship." Here he evidently uses the judgments as subsidiary to the oral evidences, and does not found his decision solely upon them. He says, besides the oral evidence, there are the judgments which prove what I say.

He makes use of them again upon the other part of the case, what he calls the merits of the case. He says, "the evidence in the record proves to the Court's satisfaction that the law governing the succession to the odhikarship of the Diflu Shastur is called 'Jaeistano Krama' or the law of the elder. That this is the law of the Shastur, will appear from the judgment in suit No. 1 of 1856 of the Court of the Assistant Commissioner of Nowgong, dated the 12th of February 1857, confirmed in appeal on the 5th of June 1857, and in suit No. 630 of 1869, of the Court of the Moonsiff of Nowgong, dated the 28th of December 1869. Judgments like these being analogous to judgments *in rem* are evidence against the whole world, and may be received as evidence in the present suit. Besides, there is oral evidence in the record sufficient to corroborate these judgments." I do not understand that he used the word 'corroborate'

in its strict sense, but he considered that there was oral evidence in the record sufficient to prove the law of succession; and it appears that there is a body of evidence showing that the law of succession was as the plaintiff contended for, and there is also oral evidence of Koosho Chunder Gossamee being the *Odhikar* before the plaintiff, and of the plaintiff subsequently being in exercise of the office. Therefore, supposing these judgments were not admissible for any purpose, there appears to be sufficient evidence to support the decisions of the Lower Courts without them, and that is an answer to the objection that they have been improperly admitted.

But I think the judgments were not improperly used. Upon the first question as to possession of the office they showed that the person named in them was successfully asserting a right to the possession, and upon the other question of the custom or rule of succession, they showed instances in which the custom alleged had been successfully asserted. The Judge is not right when he speaks of them as being analogous to judgments which are evidence against the whole world, if he used the words in the sense of their being evidence of title against the whole world. He would be right if he treated these judgments in the way I have mentioned. But any misapprehension of this kind on his part on this point, cannot with the evidence there is in the case be made a ground for reversing his decision.

This case is governed by what was the law before the passing of the Evidence Act. Or it may perhaps be a nice question, which law was applicable to it as it was heard by the Moonsiff when the old law was in force, and in appeal after the new law took effect. But I do not think it makes any difference substantially, the new law on this matter is the same as the old. Section 43 of Act I of 1872, provides that judgments, orders, or decrees, other than those mentioned in Sections 40, 41, and 42 which apply, do not apply in this case are irrelevant, unless the existence of such judgment, order or decree, is a fact in issue, or is relevant under some other provision of the Act. Were these judgments relevant under any provision of the Act? I think they were under Section 13 which provides that where the question is as to the existence of any right or custom, the following facts are relevant:

(a) Any transaction by which the right or custom in question was created, claimed, modified, recognized, asserted, or denied, or which was inconsistent with its existence :

(b) Particular instances in which the right or custom was claimed, recognized, or exercised, or in which its exercise was disputed, asserted, or departed from.

Here the right to *Odhikareeship* was in question, the custom or law of succession was in question, and these decrees showed instances in which the right had been asserted, and claimed. They were also instances where the custom had been claimed, and the exercise of it had been asserted. I think they were admissible under the provisions of Section 13 of the Evidence Act. They were some evidence of an enjoyment or possession of the office according to the title asserted by the plaintiff. Therefore, there is no ground, I think, for this special appeal. It must be dismissed with costs.

THE 1ST AUGUST 1873.

*Present :*

The Hon'ble J. B. PHEAR, }  
 „ G. G. MORRIS, } *Judges.*

CASE NO. 1493 OF 1872.

*Special appeal from the decision passed by the Officiating Judge of Bhagnulpore, dated the 27th July 1872, reversing a decree of the Subordinate Judge of that district, dated the 13th September 1871.*

Baboo Lalljeet Singh forself  
 and as father and guardian  
 of Baboo Rajuarain Singh,  
 minor, (defendants,) ... *Appellants,*

*versus*

Baboo Rajcoomar Singh, (plaintiff,) ... *Respondent.*

*For Appellant.*—Messrs. Branson and C. Gregory, and Baboo Romesh Chunder Mitter.

*For Respondent.*—Mr. J. T. Woodrooffe, Baboo Mohes Chunder Chowdhry and Kally Prosono Dutt.

Under the Mitacschara sons can at any time during the father's life at their pleasure call upon him to partition. The ancestral property and in that event the mother must have a share for her maintenance.

*J. B. Phear.*—In this case a son sues his father, and his brother who is a minor to obtain partition of certain ancestral property, the family being a joint Hindoo family governed by the Mitacschara law.

Two principal questions have arisen in the suit; first,—whether a son can sue his father to obtain partition of ancestral property during his father's lifetime; and secondly, whether if he does so, and the mother is alive, the mother is entitled on the partition to have a share by way of maintenance or otherwise.

In this case it is admitted that the mother is alive, and the plaintiff has not made her a party to the suit, not only has he omitted to make her a party to the suit, but he maintains that she has no right to a share on any ground, and ought not to be a party to the suit.

With regard to the first issue just mentioned, a decision of the Madras Court, which is reported in 1 Madras Reports, p. 77, has determined that a son can sue during his father's lifetime for partition of the ancestral estate. A decision of a Full Bench of this Court, reported in VI Weekly Reporter, p. 18, is to the like effect. Also a judgment delivered by a division Bench of this Court, which is reported in IX Weekly Reporter, countenances the proposition that on a division of the ancestral property during the father's lifetime his wife is entitled to a share for her maintenance, although, no doubt it does not judicially determine the point.

Notwithstanding these authorities bearing upon both these issues, it was very strongly urged upon us on behalf of the defendant on the one side, and on behalf of the plaintiff, on the other, that neither proposition was well founded in Mitacschara law. We have felt it necessary to examine somewhat closely the text of the Mitacschara so far as it bears upon these two issues.

The first section of Chapter I, may be described as an elaborate discussion and somewhat artificial analysis of several ancient texts, serving to lead up to the conclusion that each member of a joint Mitacschara family acquires by birth a certain indefinite right of property in the paternal and ancestral estate: that the father or head of the joint family has an independent power of disposal for certain purposes of the family effects other than immovable property, but is subject to the control of his sons, and



the rest of the family in regard to the immovable estate whether acquired by himself (though it must be remarked by the way that this is afterwards greatly modified, section 5, paragraph 10) or inherited from his father or other predecessor (para. 27): with, however, this one exception relative to the control, namely, that while the members of the joint family are minors or incapable of giving their consent to a gift and the like, one member of the family may conclude a gift, hypothecation, or sale even of the immovable estate if a calamity affecting the whole family require it, or support of the family render it necessary, or indispensable duties such as the performance of the father's Shraddh makes it unavoidable (paragraph 29.)

The three last paragraphs but one of the same section, i. e., paragraphs 30, 31, 32, furnish an interpretation of two or three texts which, without it, would seem inconsistent with the foregoing view of the law; and explain that these texts only refer to certain precautionary formalities, which ought to accompany, but which are not essential to the validity of any dealing with joint family property.

And the last paragraph (33) reserves, to a later part of the commentary, the mention of a certain distinction between the right acquired by birth in paternal, and that in ancestral estate. We find this distinction reasoned out in Section V, and given concisely in paragraph 10 of that section. One effect of it is, as already stated, to relieve the father from the control of his sons as regards his acquired property.

The indefinite right in the joint property which as thus explained is acquired by birth, is capable of being rendered personal (so to speak) and separate by partition; and in the next paragraph (which Mr. Colebrooke has made the first paragraph of Section II) the commentator proceeds to consider "*at what time, by whom and how, partition may be made.*" For this purpose he first cites the text of his author (Yajnavalkya) which runs thus: "When the father makes a partition let him separate his sons from himself *"at his pleasure, and either dismiss the eldest with the best share, or if he choose, all may be equal shares."* After developing this text slightly, the commentator says in para. 6, that the power of *unequally* distributing the property, which it confers on the

father relates solely to his self-acquired property, because unquestionably he has not such power in regard to ancestral property, by reason of equality of ownership therein on the part of himself and his sons, which the commentator undertakes to explain, later, and which he does explain (as already mentioned) in para. 10 of section 5. The text with this qualification in effect may be put thus:—"When a father makes a partition, he may give his children equal or unequal shares as he thinks fit except that in partitioning ancestral property he must give them equal shares." This method of first deducing the general proposition from one text or authority, and then cutting it down by an exception made on the foundation of another, prevails through the whole of the commentary.

The commentator next proceeds to state the occasions on which a partition may be effected, a step which ought logically to have been taken previously to making any mention of the father's powers of distribution, for taken here, it effects a break in the continuity of the discussion relative to the question of shares on partition. These occasions are, (paragraph 7) at the pleasure of the father during his life, at the pleasure of the sons after his death, and also at the pleasure of the sons during his life against his will, provided that certain specified events occur. Nothing appears here to limit the application of this passage to the partition of the father's self-acquired property only; the partition of his property *generally*, ancestral as well as self-acquired, seems to be meant, and the Madras High Court has so interpreted the paragraph (1 Madras 77.) This view is confirmed incidentally by a remark which is made by the commentator in paragraph 4 of Section III, and which will be presently referred to. Besides these occasions of partition, paragraphs 8 and 10 of Section V, no doubt, add another, namely, at the pleasure of the sons during the father's life so far as regards ancestral property; and therefore the like result would in the end be reached, if one supposed the previously-mentioned occasions of partition to have been spoken of in regard to self-acquired property only, excepting that under that supposition there would be no direct authority anywhere for the father's partitioning the ancestral property during his life; and that there is certainly no reason afforded for this limitation

upon the exercise of the father's discretion. On the whole, there seems to be no cause to impeach the justness of the Madras High Court's opinion, and much to support it.

At the point which we have now reached, the commentator returns to the question relative to the amount of the shares; he says (section 2, paragraph 8) "two sorts of partition at the pleasure of the father have been stated, namely, equal and unequal," and after quoting a text of Yajnavalkya ("If he make the allotments equal, his wives to whom no separate property has been given by the husband or the father-in-law, must be rendered partakers of life portions,") he represents the effects of it to be that "when the father by his own choice makes all his sons partakers of equal portions, his wives to whom peculiar property had not been given by the husband or the father-in-law must be made participant of shares equal to those of sons." But if he give the sons unequal shares, "his wives do not take such portions but receive equal shares of that which remains after the allotments to the sons have been deducted." As in the previous section, there is nothing here expressed to limit the application of these passages to the partition of self-acquired property alone unless it be the words "by his own choice," but these seem to refer rather to the act of partition than to any discretion in regard to the magnitude of the shares, and the upshot of it appears pretty plainly to be, that while the father in partitioning the property which he has, of whatever kind, may in some cases make a difference in the shares which he gives to his sons, he must in no case make any in the shares, which he gives to his wives. There arises, further, the inference that in all cases of a partition by the father his wives are entitled to the shares mentioned, and this inference is rendered certain by paragraph 1 of Section 7, which will be quoted hereafter. In the remaining paragraphs of section 2, the commentator points out cases in which a father may be justified in giving even a nominal share to a son, and also that a legally effected distribution by the father in unequal shares cannot be set aside: this can only be done, when the father has acted under undue influence and so on.

In the paragraphs of section 3, the question of partition at the instance of the sons

after the death of the father and mother is dealt with, and although this particular topic is a little remote from that which is before us, yet the reasoning by which the result, namely, that brethren should divide only in equal shares (paragraph 7) is reached, exhibits same points which are of use to us, and for that, cause has been already alluded to. At the outset of the section, the commentator represents his opponents as objecting to such texts as that of Yajnavalkya (quoted in section 2) "Let him either dismiss the eldest with the best share," and sanctions an unequal distribution of property when the division is made in the father's life-time, and that consequently an unequal division is admissible at every period; but the answer which the commentator makes is, not that these texts were delivered in view of a special partition, as of self-acquired property only, but true: this unequal partition is found in the sacred ordinances, but it must not be practised, because amongst other things there exist counter or qualifying maxims and texts. The commentator then goes on to argue that in as much as "Assustambo declared, a father making a partition in his life-time should distribute the heritage "(i. e. the ancestral property, see section 1, para. 2) equally among his "sons," therefore the sons dividing his property after his death (when it must all of it necessarily be in the situation of ancestral property) must divide it only in equal shares.

We thus see it disclosed that the texts quoted in section 2, are quite general in their original meaning, and are only restricted in operation, so far as they are restricted at all by the force of other qualifying texts. We also see it recognized that the incidents of a partition effected at the instance of the sons, must correspond strictly with those of a partition of the like property effected by the father. In this way, it appears, at once, that the view which the Madras High Court took of the general scope of paragraph 9, section 2, is correct, that the directions of paragraphs 9 and 10 of the same section, with regard to shares of widows, are equally general, and that these directions apply to partitions effected at the instance of sons, as well as those effected at the father's own pleasure only.

The paragraphs of section IV only describe property which is of such a nature that

it ought not to be divided. But those of section V again revert to the distribution of joint property on partition. First, we had the case of partition by the father of his own will during his life-time; secondly, partition effected by the sons after the death of both father and mother of property generally which had been held by the father. Here we have something supplementary and more particular. The commentator declares that in the distribution of the grandfather's (i. e., ancestral) property whenever, the partition takes place, the adjustment of the grandson's share must be effected through their fathers: thus, if the father is dead when the partition takes place, the grandsons only get the share which would have fallen to their father, had he been alive at the partition; and if he is alive they only share with him what he gets. But the commentator states emphatically that in that share they are co-owners with the father, and, in a partition of it, have equal rights with him independently of his will, and he is at much pains to combat the contrary notion, saying in particular that the text—"When the father makes a partition," &c., which has been already quoted, and others, so far as they countenance unequal distribution by the father, apply to his self-acquired property only. He goes on further to pursue this doctrine to its consequence, and in paragraphs 8 and 11 demonstrates that the son can, at any time during his father's life-time, demand, whether his father be willing or not, a distribution of the ancestral estate. Finally, in few words (paragraph 10) he sums up by stating the difference in the son's right to the father's and the ancestral property, the distinction which he had previously promised to make; the paragraph runs as follows:—

"10. Consequently the difference is this: although we have a right by birth in his father's and in his grandfather's property, still, since he is dependant on his father in regard to the paternal estates, and since the father has a predominant interest as it was acquired by himself, the son must acquiesce in the father's disposal of his own acquired property: but, since both have indiscriminately a right in the grand-father's estate, the son has a power of interdiction (if the father be dissipated the property.)"

Section 6 commences with the question, how shall a share be allotted to a son born subsequently to a partition of the estate? This is discussed at great length with reference to the text "when the sons have been separated, one who is afterwards born of a woman equal in class, shares the distribution," and the substance of the answer, is, that he only gets a share of that which is left with the father and mother after the partition, and has no right whatever in that which had been allotted to his separate brothers, while they also, on the other hand, retain no right to any other portion of the father's estate of whatever kind, and get none in any thing which the father may subsequently acquire. A passage in the second paragraph of the section in which it is said generally of the afterborn son of the text, "What is distributed, is distribution, meaning the allotments of the father and mother: he shares, that," serves inferentially to show that in any distribution obtained during the lifetime of the father, without limitation as to the nature of the property, a share is allotted to the mother *as well as to the father*. And this seems to be made quite clear by the first paragraph of section 7 which is as follows: "when a distribution is made during the life of the father, the participation of his wives equally with his sons has been directed (if he make the allotments equal, to his wives must be rendered partakers of like portions," *Yajñavalkya*.) The author now proceeds to declare their equal participation when the separation takes place after the demise of the father. Of heirs dividing after the death of the father let the mother also take an equal share." The remainder of section 7 is taken up with the discussion of the rights of unmarried daughters, and against the sons on a partition effected after the death of the father; but with this we are not now in any degree concerned, because the 14th and last paragraph of the section, declares that it is only after the decease of the father that the unmarried daughter participates in the inheritance. Before his death she obtains that only whatever it be which her father gives.

Thus upon a view (unfortunately somewhat lengthy) of that part of the *Mitakshara* which affords materials relevant to the two principal issues which are before us, there appears to be no real obscurity. The result,

so far as we are at present concerned, may be stated very shortly as follows:—The father, during his life, may at his pleasure partition the whole of the property in his hands or any of it, and if he does so he must allot a share to his wife for her maintenance, in addition to the share which he takes himself; also the sons can, at any time during the father's life at their pleasure (even when any of the contingencies which entitle them to divide the *whole* estate have not happened), call upon him to partition the *ancestral* property, and in that event also the mother must have her share as before. After the father's death, again the sons may divide the property among themselves, but then too they must give a share to their father's widow and to an unmarried sister, if there is one. In all the cases alike the mother's share in the ancestral property must be equal to that of a son.

It follows then that we must determine the first of the two issues before us in favor of the plaintiff, but the second issue against the plaintiff.

The mother being entitled, as we understand the text of Mitakshara, to a share in the ancestral property by way of maintenance upon the occasion of a partition being effected at the instance of the son, she ought to be a party to this suit, and in as much as she has not been made a party, the suit in its present form must certainly fail. The only question which remains is whether or not we ought to give the plaintiff any facility for the purpose of enabling him to carry on this suit upon the basis of the present plaint, by allowing him to amend it and to make the mother a party on the record.

We observe that supposing the mother to be thus made a party, there is already one issue of fact, and there may arise other questions of fact upon which she will have a right to bring evidence, and to insist upon a complete re-hearing of the case. There seems to be no actual agreement between the parties as to the property which is to be divided. And again the father, defendant, has already set up that the plaintiff is estopped by what has taken place between them on a former occasion from claiming a partition of the ancestral estate even assuming he has that right. The Courts below have come to the conclusion that this matter of estoppel is not made out against the plaintiff. But unquestionably the mother would

be entitled, if she was so advised, and was upon the record to have that issue tried a fresh and to offer additional evidence upon it, so that if we send back this case with the direction that the mother be put upon the record in order that the plaintiff may be enabled to carry on the suit properly, there must necessarily be a new trial in the first Court with regard to the facts which constitutes the general merits of the case. This being so, we are bound to look at the behaviour of the plaintiff to satisfy ourselves whether or not he is entitled to this indulgence at our hands. Now it is quite clear that he has, from the commencement as has already been stated, not only omitted to put the mother upon the record, but persistently refused to acknowledge her right to a share; and has up to this last Court of Appeal most strenuously fought out that issue. We find, moreover, that both the Courts below are of accord with regard to the character of the contest between the plaintiff and his father. The Lower Appellate Court says, "That the facts seem to show that the plaintiff is a profligate spend-thrift, whom his father has attempted to control, and yet the law must assist the extravagant son in dismembering the estate in spite of his father's objection."

We think having regard to this finding and to all the other circumstances of the case which have been referred to, that we ought not to afford the plaintiff any special indulgence in this matter. The suit cannot go on as it is at present framed, and we shall limit ourselves to reversing the decision of the Lower Appellate Court, and dismissing the plaintiff's suit with costs. This decision will, of course, be without prejudice to his right to bring a future suit for partition making all the interested persons' parties to it.

*Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Ramanoogra Narain v. Mahasoondur Koonwur, from the High Court of Judicature at Fort William in Bengal, delivered on Friday, 27th June 1873.*

*Present :*

SIR JAMES W. COLVILLE,  
SIR BARNES PEACOCK,  
SIR MONTAGUE E. SMITH,  
SIR ROBERT P. COLLIER, and  
SIR LAWRENCE PEEL.

*For Appellant.*—Mr. J. F. Leith, Q. C., and Mr. J. D. Bell, instructed by Mr. T. L. Wilson.

*For Respondent.*—Mr. J. W. Cave, instructed by Messrs. Watkins and Latty.

M executed his deeds conveying to her two daughters in equal moieties, immediately and absolutely certain mouzas which she had the power to dispose of absolutely.

One of the daughters died shortly afterwards, leaving an infant son who survived her three days, whereupon her husband B brought a suit against M to recover possession of his wife's share of one half of the mouzas so conveyed by M. M's defence that the conveyance was meant to operate as a Will after her death was established upon the evidence. Upon the suit of B one of the creditors of M in which the plaintiff R had intervened, the deeds were found to be inoperative and fraudulent against creditors.

Held that the judgment in the suit of B operated as no estoppel in the present suit of B wherein the parties are not the same issue involved in the two suits, the same and that although plaintiff R, is not entitled to maintain a suit for present possession of the property, he is entitled to a declaration that his wife had, and that he, as the heirs of his wife, through his infant son, has the right to a vested remainder upon the death of M. and that he is entitled to have his name substituted for that of his wife upon the register.

The suit out of which the present appeal arises was brought under those circumstances :

A widow lady, named Mahasoondur Koonwur, had two daughters, both married, and on the 28th August 1860 she executed two deeds conveying to them in equal moieties immediately and absolutely certain nine mouzals, of which she must be assumed to have had the power of absolutely disposing.

In the year 1864, Geer, one of her daughters, died, leaving an infant son who survived her three days, whereupon her husband the present plaintiff, brings this suit for the purpose of recovering possession of Geer's share of one-half of the nine mouzals so conveyed by Mahasoondur. Mahasoondur's main defence, which it becomes most material to consider, is thus stated by her: "With a view of preventing disputes in future amongst her two

daughters she executed a deed of gift in the nature of a will, with this intention that she should remain in possession during her life, and after her death her daughters would be entitled." The plaintiff, undoubtedly, proved a *prima facie* case. He showed the execution of the deed conveying the half of the property to his late wife; he showed that the name of his late wife was substituted for that of Mahasoondur on Mahasoondur's own application, and that an amulnamah was shortly afterwards executed by Mahasoondur, wherein she required the tenants to pay rents to her daughter, and he gave evidence that the daughter (his wife) had remained in possession of these mouzals during her life, although it appeared that after her death, by some means or other, Mahasoondur had resumed possession of them. This case was answered on the part of Mahasoondur in this way. She called several witnesses to prove that at the time of the execution of the deeds there was a verbal arrangement that they should operate only as a conveyance of the property after her death; and that during her life her daughters were to retain her property in trust, or, as it is sometimes called, benamie for her. Evidence was given that the plaintiff himself, Ramanoogra, the husband of the other daughter Bhowanee, and Jeetun Lall the father of the plaintiff, were parties to this transaction, and indeed the prime movers in it; and it may be observed that neither the plaintiff nor Jeetun Lall, his father, was called upon the part of the plaintiffs to contradict this. Some evidence was given on the part of Mahasoondur that she actually received the rents; and it was argued, undoubtedly with great force, that it was extremely improbable that she should without apparently any consideration denude herself absolutely for her life of the bulk of her property. Such was the nature of the issues and of the proof as between the parties in this cause.

But the case is complicated in this way: one Bishen Lall, a creditor of Mahasoondur, instituted a suit against Mahasoondur, to which the present plaintiff became a party by intervention, for the purpose of setting aside the deeds in question, on the ground that they were fraudulent as against creditors. Both cases were tried together and one judgment was delivered in both. The substance of the judgment is that these deeds were altogether colourable, being in

*The April 26, 1873.*

CRIMINAL APPELLATE JURISDICTION.

*Appeal from the Decision of the Sessions  
Judge of Purneah.*

The Hon'ble F. B. KEMP and } Judges.  
" " J. B. PHEAR, }

Queen *versus* Syed Abdool Kader  
Khan, ... Appellant.

*For Appellant.*—Mr. M. Ghose.

*For Prosecution.*—Baboo Jugadanund Mookerjee.

When a person charged with misappropriation of money which is alleged to have come into his hands distinctly states how he has applied it, it lies upon the prosecution to prove the fact that it was not so applied.

*Phear, J.*—Although this case is one of a class of which this Bench has lately had several examples, still it appears to me in some of its features very remarkable. The trial of the prisoner, Abdool Kader Khan, upon the charges framed against him was, in fact, as the trial has been had, a duel upon somewhat unequal terms between him and the principal witness for the prosecution, Rudro Chunder Mallik. If the prisoner did not embezzle the sums of public money, which are the subject of these criminal charges, then, undoubtedly, Rudro Chunder did. Under these circumstances, it appears to me that it did especially behove the Sessions Judge to hold the balance impartially between the two men, and to make the prisoner every fair allowance for the disadvantage of his situation in the dock, even though at the risk that the final result might be, that neither of the two men should be convicted. Instead, however, of following the well-known rule of fairness, which is rendered obligatory by the English mode of trial procedure, namely, the rule of giving the prisoner the benefit of every reasonable cause of doubt, it appears to me that the Sessions Judge, in the elaborate judgment which he has written, has been, unconsciously, no doubt, still, in fact, astute to explain

favorably all the damaging points, which are to my mind many, in Rudro Chunder's conduct, and has gone out of his way somewhat to find matter of prejudice against the prisoner. It also appears to me that the learned Judge has applied certain provisions of the new Evidence Act in a mode which was not contemplated by the Legislature. He seems to me to have employed them, so far as I understand his language, as a means of working out a verdict from certain data, as if by, I will say, an algebrical or other scientific process; and I do not think that the Legislature, in enacting those provisions, meant to prescribe any thing of the kind. The Evidence Act is substantially an embodiment of those rules and maxims relative to the reception and value of evidence which have long been the law of the forum in English Courts of Justice. The great purpose of these is to ensure that the best evidence shall be placed before the jury, and they do not, in any degree, relieve the jury from the obligation to use their own common sense in finding on the facts from the whole of the evidence when it has come to be placed before them. And so I think the Evidence Act here was not intended to provide any short road to a decision; it did not, I think, prepare for the Judge a machinery of successive shiftings of *onus* by which his opinion was to be guided. \* And I think that its sole purpose here, as in England, is, as I have said, to ensure that the evidence shall come before the Court in the best and most trustworthy form, and when the evidence is all before the Court, the Court must form the best judgment on the facts from the whole of it which it can by the exercise of its judicial discretion. I may further add that the prisoner, Abdool Kader Khan, a Behar Mussulman, and Rudro Chunder Mallik, a Bengali Hindoo, appear, by the facts which have been disclosed, to be both men of uncommon ability; they both possess apparently an entire command of the English language, using it on all occasions instead of the vernacular, probably, perhaps, because they have not a common vernacular (I do not know how that may be), and that the written defence put in by the prisoner, if it is substantially his own composition, as we have been told it is, is so excellent, so appropriate, as to recall to mind the defence of a prisoner, made by himself in England during the last century, which was at one time very celebrated. I now approach the facts of the

case. They are very simple. In the latter part of 1870, and the first part of 1871, and indeed, I may say, some time before these years, Rudro Chunder Mallik was the head clerk of the Purneah Collectorate. In the parts of 1870 and 1871, which I have mentioned, he was taken away from his office, and employed as income-tax assessor or collector—assessor I think—and during this period the prisoner officiated for him as head clerk. On the 15th of July 1871, he resumed his duties. The prosecution says that the prisoner at this time had, in his possession as officiating head clerk, two particular sums of public money, namely, a sum of Rupees 460 which had got in his hands in March 1871, and another sum of Rupees 60 which had come to him in July 1871; that he was bound to hand these sums over to Rudro Chunder upon his taking office, and that he did not do so. The prisoner admits that he had these two separate sums of money, but he asserts that he gave them over to Rudro Chunder, and he files the two documents which have been put in to Court signed by Rudro Chunder to show that he did so. The prosecution alleges that these two papers are forgeries. Upon this foundation the prisoner is charged as follows: 1st.—That he being entrusted with Rupees 460 in his capacity as head clerk, on the 6th of March 1871, or thereabouts, committed breach of trust in respect thereof. 2ndly.—A similar charge is made against him with respect to the Rupees 60. The 3rd charge is that he forged the receipt marked B which is one of the two documents I just now spoke of. 4th.—That he used that document as genuine, knowing at the time that it was forged. There is further a 5th charge which arises out of another matter, and which I will, for the present, leave on one side. Now this document (B) is a narrow slip of paper, upon which appear admittedly in the prisoner's handwriting these words: "Received Rupees 520 only," and underneath this, but on one side of it, is the signature of Rudro Chunder Mallik, admittedly also in the handwriting of Rudro Chunder. The prisoner's account of the mode in which he got this I will give presently. It will be observed that this document is in terms a receipt bearing the undoubted signature of Rudro Chunder Mallik, a receipt for Rupees 520, i.e., the total of the two items of Rupees 460 and Rs. 60. If then this be a genuine

paper, there is an end of all four charges against the prisoner. On the other hand, if it is not genuine but a forgery, then, undoubtedly, the prisoner is guilty of one of the two offences charged in the 3rd or 4th charge, and probably also of the offences which are the subject of the 1st and 2nd charges. It seems to me, therefore, convenient, in the first place, to concentrate our attention upon the question whether or not this document is a genuine document in the sense of its being a receipt given by Rudro Chunder Mallik by way of acknowledging his having received Rupees 520. The prisoner states that Rudro Chunder Mallik rejoined the appointment on the 15th of July a Saturday; that he, the prisoner, had, on delivering over charge to Rudro Chunder, to hand over to him these two sums of money, Rupees 460 and 60, amongst other things; but that this was not done on the Saturday: also, that he did not himself give up all official work in consequence of Rudro Chunder's return to his duties, because he was retained by the Collector to bring up certain arrears in the Gazetteer or other department. Although nothing of this was done on the Saturday, the prisoner states that he told Rudro Chunder on that day that he had money to hand over to him with the other articles of charge, and he further says that, on the Monday morning, he received from Rudro Chunder this formal letter which has been marked (C) in the Court below: "Dear Sir,—I am desired by the Collector to request you to make over charge of the office to me in the spirit of the memorandum written by him on the occasion of my first receiving charge of the English office; you will make out a list of all pending letters noting the files or monthly bundles in which they have been placed, furnish detail of monies to be handed over to me, and make over charge of all the books, survey volumes, and survey apparatus as per library catalogue. I presumed you are not prepared to deliver over charge in the way pointed out to-day. It would, I think, suit the convenience of both of us to go to the office a little earlier to-morrow. I would suggest the expediency, if possible, of your arranging the preliminaries to-day. Yours truly, R. C. MALLIK. 17-7-71."

At the foot of this document there is written, in faint ink, in another handwriting,

under a reference to the word "monies" in the text—

"460 on account of maps.

"60 was spent out of 85 from Mirza's money.

—  
"Total 520."

But there is no evidence offered by either side to show how, and when, and by whom, this note of the details of the money was put upon this letter. The prisoner goes on to say that, having received this letter, and being desirous of being relieved of the charge of the monies as soon as possible, he, in accordance with the tenor of the last passage of the letter, went over to Rudro Chunder's house, taking the Rupees 460 with him; that upon arriving there, he did hand over the monies, took up a slip from the table, and wrote upon it with his own hand, the receipt, part of the document (B) which I have just read out; that Rudro Chunder then signed this as a receipt, and gave it back to him. He further states that upon returning to his house, on some other part of the day, he received from Rudro Chunder the other document to which I have referred, and which has been marked (D), and runs in these words: "Dear Mr. Abdool Kader,—Here goes the man for the Rs. 460," signed by Rudro Chunder. Rudro Chunder Mallik swears not only that he did not give that first document (B) which bears his signature as a receipt, but also a portion of this document that I have just now read is not in his handwriting, although the rest is. He says that the words "man" and "Rupees 460" are not his, but he admits that the remaining words and the signature are so. Which are we to believe in this matter of these two men? The learned Judge has, in more than one place, remarked that the statements made by the prisoner are mere allegations, not proved, whereas he takes the statements which are made by Rudro Chunder on oath as equivalent to proof. I am not sure that I quite apprehend the distinction which the learned Judge here intends to draw. No doubt the prisoner's statements are not statements made on oath; they are only the statements of a man defending himself in the dock, while the statements made by Rudro Chunder are made under the sanction of an oath, and therefore he is liable to the punishment of perjury, if in them he states that which is false. But

when the prisoner is making a statement of fact, of which he himself alone, other than Rudro Chunder, can speak, no better proof appears to be available in the case than the statement of the prisoner, even though it be unsanctioned by oath; and we must judge, as best we can, from all the surrounding circumstances, which of the two statements is the most trustworthy, or rather, I should say, whether Rudro Chunder's statements are trustworthy; because, if it should turn out on the facts that we cannot well believe either of the two men, it does not follow that therefore we ought to convict the prisoner. It is said that the form of both these documents is such as to go some way in support of Rudro Chunder's statement that they are not authentic. The slip (B) is no doubt a very curious paper to act the part of a receipt. However, the Sessions Judge had said that he does not consider the fact that the receipt portion was written by the prisoner to have in itself any invalidating effect. The great thing against the document seems to be its shape, and the prisoner accounted for this by saying that he merely took it for the purpose of its serving as a temporary acknowledgment or receipt on the part of Rudro Chunder, and that, therefore, he wrote down the words upon the first slip of paper which came to his hand; that it was, in fact, one of many slips of different sizes which were lying upon or pendent from Rudro Chunder's table, when he there handed over the money to him. Rudro Chunder, in his cross-examination, says he will not swear that he does not use narrow slips, more or less similar to this slip (B); and it is certain that he is in the habit of employing for the purpose of marking his files, slips of paper which are prepared for him with that object by the *dustree*, by cutting off slices from the sides of letters or pieces of other waste paper, so that, under the peculiar circumstances of this case, although the shape and character of a slip (B) does appear in itself at first a little likely to accord with the nature of the document to which it is attached, it is not altogether, *a priori*, in my judgment, in this respect may be correct, as the slip bears the real signature of Rudro Chunder. It is said further that this other paper (D) bears on its face manifest appearance of having been fabricated out of some-



thing else; the words "man," "for" and the figures "460" are written in a different ink from the rest of the document, and appear to have been put in the place of something erased, and are, in short, obviously different from the rest of the writing. Unquestionably this is so, and it is quite easy to imagine that the paper, in its present condition, is altered from some original which had been written by Rudro Chunder; but if this be the case, what was the original? Rudro Chunder does not give the slightest hint about this. The date apparent on the paper now is the 17th of July. Rudro Chunder, at different times, has given different accounts about this date. He thinks that the one may have been put before the "seven," so that the date, as it now stands, is not, strictly speaking, his writing; but even in that case he admits that the "7" is in his handwriting; both the "sevens," so that, according to his last account, the original of the altered letter must have been written only 10 days before the date which it now bears, and, according to his first admission, it was written on the very day of that date. If he can say, with positiveness, on his oath as he does, that the letter, as it now stands, was not written by him on the 17th, he ought, I think, to be able to say what the letter was when he did write it, say, the 7th, or, at any rate, give some reason why he cannot. There can be no doubt that on his own admission the original letter was a communication on some subject with the prisoner. It certainly ran thus: "Dear Mr. Abdool Kader,—Here goes the (something) for—(something)." Surely Rudro Chunder, if he is an honest man, could tell us what or who it was that went, and what or who it was that this predicate went for, but he does not give us the least hint upon the point. He does not even say that he cannot remember; he offers no suggestion with regard to it at all. It appears to me that, in the absence of any explanation of this kind, not to guess why such an explanation is er that the mere denial by Rudro Chunder written by g words and figures were not worthy. And is not, of itself, very trustworthy, this remark, some, though a lesser degree, this remark, applies to the matter of the admitted sign. Then it is said, on the part of the prosecution, that the mode in which the prisoner originally became possessed of these different sums of

money—Rupees 460 and 60—was, under all the circumstances of the case, such as to throw suspicion upon his honesty of purpose in retaining them in his hands, as he states he did. I do not think it is necessary to dwell much upon this part of the case. The 460 rupees were drawn from the collectorate in March in consequence of a communication from the Registrar General of Assurances, to the effect that all expenditure not actually incurred on account of the census operations must be stopped; and inasmuch as it is said certain thannah maps had been ordered, and a liability to pay for them been incurred at that time, the collector thought proper to draw out of the collectorate treasury the sum of Rupees 460, which had been sanctioned as the amount which might be spent for that purpose. It is, at any rate, certain that this money could not have been drawn out of the collectorate treasury without the sanction and authority of the collector, Mr. Worgan; and if he allowed it upon being drawn out, to remain in his head clerk's hands, it appears to me that it is a matter which he should be called upon to explain rather than the head clerk. He caused this money, as far as I can see lawfully, to come into the hands of the head clerk; and we must assume in this trial, in the absence of any explanation from the collector, that he was content to allow it to remain there. Again, in regard to the other item of 60 rupees, that was part of a larger sum which also was drawn from the treasury by the head clerk with the full sanction and authority of the collector. It appears to me that we should be going much too far, if we attributed a wrong motive to the prisoner in order to account for his retaining these sums in his hands, as he admits he did, when we see that they were, in the first instance, allowed to come into his hands by and with the sanction of his superior officer, to whom he was immediately responsible. It is indeed a misfortune. I think, as regards the interests of justice, that the absence of Mr. Worgan, which has not been entirely accounted for on the record, but which, I suppose, is due to the fact of his being away from India, has prevented his testimony on all these matters from being taken at this trial. And this is more particularly the case with regard to the 5th charge, to which I shall come presently. On a review, then, of this part of the case which

I have just now touched it seems to me that there is very little, if any, evidence which can serve to strengthen Rudro Chunder; that is to say, to make his statement with regard to these two documents trustworthy, if there otherwise be any reason which causes us to distrust Rudro Chunder himself in the matter which lies at the bottom of this trial. Now it appears to me that very much has been disposed in this case which should make us pay before we convict the prisoner of the offence with which he is charged upon the testimony of Rudro Chunder Mallik alone. It seems that while Rudro Chunder was acting as income-tax assessor, the prisoner was acting in his place as head clerk. The basis upon which this arrangement was made were matters of private agreement between the prisoner and Rudro Chunder himself. What they were precisely has not been clear. I suppose from some statements made by Rudro Chunder Mallik, that during most of this time, at any rate, the two were carrying on their respective work in the Sudder Station of Purneah, if not the same room, at any rate in adjoining rooms of the collectorate building, and the two constantly corresponded with one another on odd slips of paper. Several letters and notes which the prisoner in this way received from Rudro Chunder have been found in a more or less perfect condition, and I think I may safely say that they certainly disclose a very remarkable relation existing between these two men. Several of them do not bear dates, and it is difficult to place them in their proper orders, for, most intelligibly to me, Rudro Chunder was made to give an account of them at the trial, as ought to have been the case. It was most important that all possible light should have been thrown upon the situation of these two men relative to each other, and a proper examination of Rudro Chunder with regard to these letters, and especially with regard to the portions of the old letters which are torn off and missing, could hardly have failed to elicit exceedingly useful information. So far, however, as these letters and scraps of letters speak for themselves, they appear to be very instructive. The first, as far as I can make out, is one dated 28th April 1871. It runs in these words: "It will, I think, suit us both if I can manage to keep myself away till the end of

May. I intend to write to the collector that a month's relaxation is much longed for by me after a protracted labor, and in making this application, I will touch upon the private arrangement which we are on the eve of making as regards our pay. I will rest content with my pittance of Rupees 80 from after the 8th of May, and I hope your retention will, in no way, be disadvantageous to you. I have ventured this opinion for your consideration, and shall be glad to know whether you are for *pros* or *cons*. As regards the contents of this note, I impose on you threefold obligation of silence." I gather, from the letter itself, that it was probably written just about the time when Rudro Chunder's duties as income-tax assessor were about to expire, and that he proposed some special arrangement to the prisoner, the details of which are not quite easy to be ascertained, as the foundation upon which he would apply for a month's leave. This much, however, is abundantly clear, that he thought it would be very small credit to him if this letter came before other eyes than those of himself and of the prisoner, and, accordingly, he imposed upon the latter in a very extreme form the obligation of silence with regard to it.

Two days afterwards, namely, on the 1st of May 1871, Rudro Chunder wrote again in the same matter as follows: "My dear Moonshee Abdool Kader,—I should like to know whether you would have any objection to your parting with Rupees 100 as soon as I am done with my work. On this condition alone I would apply for a month's leave, otherwise not. Should you have no objection, I beg of you to tender me this sum on the 7th instant, the date on which I make my intended application to the collector, I dare say, when he will receive my final report, he will insist upon my retiring to the head clerkship.

I cannot close this note without making allusion to the adage that 'partial evil has universal good.' I write you this in confidence, and lie in wait of an answer."

It seems to me here the commencement of bargaining in definite terms. Rudro Chunder proposed to avoid coming back to head clerkship, and so turning the prisoner out of office, which event he would necessarily result in ordinary

course upon the presentation of his final report to the collector, by asking for leave of absence for a month, and inasmuch as this would be of advantage to the prisoner, he also proposed to him as the condition of his asking for leave that the prisoner should part with Rupees 100 as a consideration.

On the 7th of May, the date specially mentioned in the proposed terms, comes a third letter: "My dear Moonshee Abdool Kader,—Herewith goes my peon, Ishur Roy, for the promised dib of Rupees 100. Please hand it over to him, and return the enclosed application after inspection;" and then in a postscript: "On the receipt of the money I will send up the application." So that it appears to be clear that by the 7th of May, the day on which Rudro Chunder had proposed to apply for his leave, the prisoner had agreed, at any rate, he, Rudro Chunder, thought so, to part with the Rupees 100 according to the imposed condition, and I think we may rightly infer, in the absence of anything to indicate the contrary, that this money was paid by the prisoner to Rudro Chunder, for the application for leave was admittedly made and granted, and Rudro Chunder at once availed himself of it. The exact date upon which he did so is nowhere stated, but I am inclined to think, from the general tenor of a letter which Rudro Chunder wrote to the prisoner on the 17th of May, that he had, at that time, gone on leave, and was away from the collectorate. I must remark, in passing, that there is, in this letter, the following significant passage: "I feel it anything but necessary to remind you that your prosperity is intimately bound up with mine." The remainder of the letter, however, does not appear to be capable of yielding us any assistance in the matter before us, and I refrain from reading it at length. The next fact of importance which presents itself to me from this series of letters is this, namely, that when the month's leave was coming to an end, Rudro Chunder began again to bargain with the prisoner as to the terms upon which he should agree to ask for an extension of leave. On some unspecified date Rudro Chunder wrote to the prisoner a letter, a fragment only of which is marked (R) in the Sessions Court, has been put in evidence. This fragment is in the words: "My dear M. Abdool Kader, Herewith goes my application for an extension of leave. Please return it after inspection.

The promised dib." Another undated fragment (O), I am disposed to think, must come near in date to (R). It runs thus: "My dear Moonshee Abdool Kader,—I cannot be persuaded to think that the parting with a hundred rupees would, as you seem to think, prejudice your interests at all;" and a third dated note, written on the margin of some original letter from a third person to Rudro Chunder (which original letter has been torn away), and marked in the Sessions Court (B) runs thus: "The pecuniary arrangement made between us is not circumscribed by any rule. I hope it will not materially affect your purse to part with the sum of Rupees 100. My pockets are infernally leaky now-a-days, and I will receive the dib with thousand thanks." A letter which, though it also bears no date, ought, I think, to be read next at this stage, is the one marked (A.) in the Sessions Court. Its words are: "My dear Moonshee Abdool Kader,—As there is every prospect of appointment of special assessors, I do not think it advisable to rejoin my appointment as head clerk; I will make an application to the collector to-morrow for an extension of my leave till the 1st proximo, and you will pay me the dib to-morrow morning when my servant calls on you." The letter, which I shall now read, follows naturally on this, possibly at some interval of time. It seems, however, to imply an extension of leave had been obtained, and must, in all probability, have been written somewhere about the middle of May. It was marked (C) in the Sessions Court, and runs thus: "Dear Moonshee! money! money! How long will you keep me with money? I have already told you that I am in very pressing circumstances. If the dib is not paid to me I will be compelled to the necessity of joining my appointment to-morrow. In this view I desire to make the application to the collector. On your decision in the affirmative or negative depends the desirableness or otherwise of my applying to the collector for the cancellation of the expired portion of my leave. Please return the application after perusal." The fragment marked (R) has been asked for by this letter, what had been the case with the previous applications of a like kind, were not paid, and accordingly Rudro Chunder applied for the extension of his leave, and returned, as

I have already had occasion to say, to his duty on Saturday, the 14th of July. It is necessary, I think, to say for a moment to the pressing for money, which is the characteristic of this series of letters, and particularly to the item of Rupees 100, which is the topic of several of them, because Rudro Chunder, when asked generally to explain this matter, said that he was throughout only asking the prisoner for the repayment of a debt made up of two sums of money, namely, a sum of Rupees 80 due from the prisoner to himself, and a sum of Rupees 20 due from him to a relative of his, Rudro Chunder's. Unfortunately this explanation was accepted by the Court as sufficient, and Rudro Chunder was not questioned further by the prosecution or by the prisoner, relative to the detail of these letters. For some reason or another, both sides sided with this matter as much as possible. Whatever this reason may have been, as things have been left, it seems to me, I must say, that no impartial person, on reading these letters, can readily believe that Rudro Chunder's explanation is the true one. The injunctions of secrecy, the request for Rupees 100 repeated on three different occasions, as the condition precedent to action & corresponding times on the part of Rudro, without the slightest allusion to an antecedent debt, the jauntily reference to leaky pockets, the call for money, money, are to my mind, when all taken together, absolutely inconsistent with Rudro's meagre version of the state of facts. It is plain to me that "pecuniary arrangement made between the two men not circumscribed by any rule," on the strength of which Rudro hoped "it would not materially affect the prisoner's purse to part with the paltry sum of Rupees 100," enabled Rudro Chunder to drain the prisoner's resources to a considerable extent. Obviously the profits of the office as these men worked it were not confined to the official salary, and two extracts from letters which I have quoted, might, if necessary, be referred to in support of this view. I infer from the letters which have been read, and which Rudro has left entirely to speak for themselves, that the prisoner paid Rudro Rupees 100 in respect of the month's leave, and, probably, another Rupees 100 for the extension, but either could not or would not pay the third Rupees

100 demanded on the threat of cancellation of leave. Possibly, I may not have placed the papers (O), (B), and (A) in precisely the right positions respectively in the series, but a mistake of this kind would not materially alter the general sense of the whole, or even the particular deductions which I have drawn from them. On the whole, the impression made upon my mind, by the perusal and consideration of these letters, certainly is that Rudro Chunder was a man in necessitous circumstances, and that he was not burdened with any scruples in regard to the mode of getting money. Money! money! is what he constantly wanted, and his ground of complaint against the prisoner was that he did not comply with his request for it so promptly as he ought.

In another letter, which is before the Court, written by Rudro Chunder to the prisoner, but not one of those which I have read, he asks the prisoner to recommend to him a man for some place in the office of income-tax assessor. He says he will "appoint him on his recommendation, on a consideration of course." This alone is enough, I think, to show that Rudro Chunder was not only in the necessitous circumstances which I have already referred to, but that he was quite ready to resort to corruption for the purpose of replenishing those pockets which he graphically represented to be so leaky.

Is the testimony of a man like this trustworthy for the purpose of convicting the prisoner of having misappropriated the money which, according to the prosecution, ought to have been, and according to the prisoner was handed over to this very man himself?

Next we have to look at the behaviour of Rudro Chunder in the latter portion of the year 1871 after he had resumed charge. His statement is not only that he did not receive this money from the prisoner in July, but also that he never knew anything about its having been drawn from the treasury until the beginning of September. About the 6th or 7th of September a letter was written to the Collector of Purneah by Mr. Beverley, informing him that 290 rupees or 295 rupees was sanctioned for the purpose of thannah maps, and sending him the sanctioned bills to that extent, and at the same time stating that Mr. Beverley had learnt from the accountant-general that the money had already been drawn on this account. The

letter ended with a direction that the money should be paid over at once to the boundary commissioner. This letter, as Rudro Chunder admits, got into his hands upon its arrival at Purneah, somewhere, I suppose, about the 8th or 9th of September, and yet he says that it did not occur to him then, upon the receipt of the letter, to make any enquiry as to who had drawn the money, or where the money so drawn was, and yet he was the very man who, by the nature of the case, would first be called on to answer for it. On the 12th of September he wrote at the direction, we must assume, or with the sanction, of the collector to the boundary commissioner to ask where the money should be sent; still, having, as he says, made no enquiry as to where the money, which Mr. Beverley said had been drawn, was. On the 22nd an answer came from the boundary commissioner, directing that the money should be sent to his office. Under this letter Rudro Chunder, as he alleges, endorsed a minute to the collector, dated the 27th of September, saying that he had made enquiries, and found the money had been drawn by the late officiating head clerk, that he had been unable to find what had become of it, and suggesting that the late officiating head clerk should be called upon to account for it. The statement of Rudro Chunder with regard to this endorsement is that he made it on the date which I have mentioned, and that he sent it with other papers in the ordinary way to the collector on the same date. It is very remarkable if this were so; for it seems that at that time the prisoner was at Purneah, and might have been personally questioned by Rudro before the endorsement was written; and if this had been done, the endorsement would hardly have taken its present shape. However this may be, it is certain that no action whatever was taken upon the subject of the endorsement until the 6th November, when, for the first time, for some reason which is not by any means clearly explained, the endorsement of Rudro Chunder came to the notice of Mr. Worgan the collector. It is obvious that this date was six or seven weeks after the date of the endorsement itself, and during all this time Rudro Chunder, by his own admission, was entirely quiescent in the matter, serious though it was both as regarded himself and the prisoner. He spoke to no one about it, and did not even take any steps

towards putting the collector in mind of his endorsement. He says that he thought he had done all which was necessary for him to do by sending the communication to the collector, and he did not afterwards think anything more of it. It is important to bear in mind that during some portion of this time, at any rate, the prisoner was at Purneah, and could have been most easily interrogated on the subject. On the 14th of October he obtained leave, and went to Patna; he returned from thence; and again on the 1st of November went away on leave. When at last the collector had his notice drawn to this endorsement, the prisoner was at Patna, and the collector immediately decided that he should be sent for. He was accordingly written to, and appears to have come from Patna at once without the smallest hesitation. On the day after his return he wrote an explanation of all the circumstances to the collector, enclosing and sending also therewith the slip (B) and the letter (C)\* of the 17th of July. This letter (C) would, I suppose, serve to show that Rudro Chunder, upon taking over charge, was quite aware that money was to be handed over to him, and the slip (B) would show that Rupees 520 had in fact been handed over. Rudro Chunder, with regard to the letter (C) which no doubt, *prima facie*, is very strong indeed against him, says that the monies which he there refers to were certain small sums which he had heard from some one were in the possession of the prisoner for stationery. The word seems to be rather a large one to use, if small sums only were looked for; and it is very remarkable that Rudro Chunder does not state who the person was from whom he had this information about the stationery. He contents himself with denying emphatically that he got any information about the stationery money or any other money from the prisoner, while, on the other hand, the prisoner's account is that he had on the Saturday told Rudro Chunder of the 450 Rupees. I should here also say that the letter (D) upon which I have already dwelt at some length, was said by the prisoner to have been brought to him on the Monday, 17th, and he accounts for it on the ground that Rudro Chunder had heard

\*This is a second letter (C). There was some confusion about the marking of the documents in the Sessions Court.











